Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 02-277
	)	
Cross-Ownership of Broadcast Stations and Newspapers	)	MM Docket No. 01-235
	)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	MM Docket No. 01-317
	)	
Definition of Radio Markets	)	MM Docket No. 00-244

COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS

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Executive Summary

Pursuant to Section 202(h) of the Telecommunications Act of 1996 ("1996 Act"), which requires the Federal Communications Commission to review its broadcast ownership rules every two years, the Commission has initiated a comprehensive reexamination of these rules. In its comments submitted in response to the *Notice of Proposed Rulemaking* ("*Notice*") in this proceeding, the National Association of Broadcasters ("NAB") first addresses relevant developments in the media marketplace that should inform the Commission's approach as it seeks to ensure that its local broadcast ownership rules still serve the public interest in a rapidly changing media environment. NAB then discusses the Commission's proposed alternatives to the current local ownership rules, and makes recommendations as to the retention, revision or elimination of each of these rules. Given the much less dominant position of local broadcasters in today's media markets, the retention of a thicket of broadcast-only local ownership restrictions in their current form is increasingly outmoded and unjustified.

As an initial matter, NAB emphasizes that the Commission has a clear duty, under both general administrative law and Section 202(h), to reevaluate the broadcast ownership rules to ensure they still serve the public interest in today's competitive media marketplace. While NAB does not believe that Section 202(h) can fairly be read as requiring that the Commission demonstrate the ownership rules to be indispensable or essential so as to justify their retention, that section does require the repeal or modification of the existing broadcast ownership regulations if they no longer serve the public interest in light of current competitive conditions. As set forth in detail in NAB's comments, several of the local ownership rules do in fact fail to serve the public interest today.

The Commission originally adopted its local ownership rules decades ago when the broadcast industry – and, indeed, the media marketplace – were dominated by a relatively small number of broadcasters offering a single channel of programming each. Technological advancements, the growth of multichannel video and audio media outlets, and an expansion in the number of broadcast outlets in the past several decades have had two highly significant effects on the mass media marketplace. First, consumers in local markets of all sizes now have access to a vast array of broadcast and nonbroadcast media outlets. Numerous surveys have documented this proliferation of media outlets in local markets of all sizes, and a new study conducted by BIA Financial Network demonstrated that consumers routinely access additional "out-of-market" outlets. Second, traditional broadcasters no longer enjoy their preeminent position in the media marketplace, but, according to the Commission, are struggling to maintain their audience and advertising shares "in a sea of competition."

In light of these technological and marketplace developments, the Commission must seriously consider whether its local broadcast ownership rules in their current form continue to serve the traditional goals of competition, diversity and localism. NAB believes that they do not. In a multichannel environment dominated by consolidated cable and Direct Broadcast Satellite ("DBS") system operators, broadcasters are certainly constrained in their ability to obtain and exercise market power, which undercuts the traditional competition rationale for maintaining a thicket of local ownership rules applicable only to local broadcasters and not their competitors. Indeed, the primary competition-related concern in today's digital, multichannel marketplace is the continued ability of local broadcasters to compete effectively and to offer free, over-the-air entertainment and informational programming (including local news) to consumers. To best achieve the Commission's goals of a competitive media marketplace that provides lower prices, better service and greater innovation to consumers, the Commission should now structure its local ownership rules so that traditional broadcasters and newer programming distributors can all compete on an equitable playing field. This reform of these broadcast-only local ownership restrictions is made particularly urgent in light of the recent judicial elimination of the local cable/broadcast cross-ownership rule.

Assuming that, as part of its competition analysis in this proceeding, the Commission attempts to define the relevant product market for advertising, NAB urges the Commission to recognize the appropriateness of broadly defining the advertising product market. Specifically, the Commission should rely on its previous decisions indicating that the local advertising market includes a number of forms of media advertising, rather than just radio or television (or any other single medium) alone.

Marketplace developments have also undercut, at least to a considerable extent, the diversity rationale for maintaining a thicket of broadcast-only local ownership restrictions. The proliferation of broadcast outlets and the rise of new multichannel video and audio programming distributors have produced an exponential increase in programming and service choices available to viewers and listeners. The public's interest in receiving diverse programming is therefore clearly being met on a market basis. Numerous studies have confirmed that the recent consolidation within local broadcast markets, especially among radio stations, has only enhanced this diversity of programming. Both older and quite recent studies moreover indicate that ownership consolidation does not significantly inhibit the expression of diverse viewpoints by commonly owned outlets in local markets. The ability of consumers to access a diverse range of media outlets to obtain differing programming and viewpoints is further significantly enhanced by the growing level of substitutability between media for both entertainment and informational purposes. Surveys recently conducted for the Commission clearly do not support the view that consumers are solely or uniquely dependent on broadcast outlets for either entertainment or for information, but reveal considerable substitutability between media for various uses. The recent and growing expansion of nonbroadcast media (especially cable, satellite and the Internet) as sources of both national and local news and information casts further doubt on the diversity rationale for retaining the local broadcast ownership rules in their current form.

In reforming the existing local ownership rules to reflect today's competitive and diverse media marketplace, NAB urges the Commission to refrain from adopting either its proposal for a case-by-case approach or for a single local ownership rule covering all media voices. A case-by-case approach is practically untenable and would cause unacceptable administrative uncertainty and delays. A voice-dependent single local ownership rule would, like voice tests generally, involve myriad difficulties in counting voices and in defining the appropriate geographic market in which to count the voices deemed to be relevant. Beyond these challenges, a single rule approach would additionally entail extraordinarily complex questions of rationally comparing or weighing media outlets of varying type and scope. In light of its goal to establish judicially sustainable local ownership regulations, the Commission should eschew this approach in favor of a simpler and less radical option specifically recognized in the *Notice*.

As discussed in the *Notice* (at ¶ 110), NAB believes the Commission should eliminate the newspaper/broadcast cross-ownership rule and the radio/television cross-ownership rule, and retain limited and properly reformed same-outlet restrictions. Despite several attempts commencing in the 1940s, the Commission has never justified its prohibition on common ownership of newspapers and broadcast facilities in the same market. It has consistently failed to establish the existence of any competitive or other concrete harms arising from newspaper/broadcast cross-ownership, and the FCC's entirely speculative diversity rationale for adopting the rule in 1975 can no longer support its retention, given consumers' ability today to access a much wider array of increasingly substitutable broadcast and nonbroadcast outlets to obtain news and information. Indeed, the case for repealing this anachronistic ban is now compelling because it inhibits the development of new innovative media services, especially online services that have features of both the electronic and print media, and precludes struggling broadcast and newspaper entities, particularly those in smaller markets, from joining together to improve, or at least maintain, existing local news operations.

The radio/television cross-ownership rule similarly does nothing to advance the public interest under current marketplace conditions. The rule is no longer needed to ensure diversity in local markets, but in its current form primarily serves to limit radio station ownership arbitrarily. With television and radio broadcasters facing unprecedented competition from cable, DBS, and satellite and Internet radio, a cross-ownership rule applicable only to local radio and television broadcast stations is inequitable and outdated. Particularly if the Commission retains the local radio ownership rule and the television duopoly rule in some form (as NAB has in fact recommended), no plausible reason exists to also retain the cross-ownership rule, as any diversity or competition concerns can be addressed more directly by these other local rules.

In light of the declining financial performance of medium and small market television stations, the Commission should reform the television duopoly rule to allow the formation of duopolies in these markets. A number of factors – including increasing competition from cable and other sources, the costs of the digital television transition, and the decline of network compensation – have combined to squeeze the profits of local television broadcasters in medium and small markets like never before. A new report prepared by NAB on television station finances clearly demonstrates the declining financial position of smaller market television stations between 1993 and 2001, particularly for those stations not among the ratings leaders in their markets. And given the considerable and growing expense of maintaining local news operations, as documented in a new study by media consultants Smith Geiger, some television stations have already and greater numbers in the future will be forced by financial considerations to forego providing local news in medium and small markets.

To preserve the competitiveness and financial viability of television stations and their local news operations, NAB urges the Commission to adopt a presumptive "10/10" rule for allowing television duopolies in all Designated Market Areas. Under this standard, two stations each with a year-long average 7:00 a.m.-1:00 a.m. viewing share of less than 10 could be commonly owned, and a station with a viewing share of 10 or more could be co-owned with another station with a share of less than 10. This reformed rule would provide needed financial relief for struggling lower-rated stations, especially those in medium and small markets, while still promoting diversity and competition by preventing the combination of two higher-rated stations in the same market, unless circumstances warranting a waiver were shown. Waivers should be considered by the Commission to allow duopolies between stations not meeting the 10/10 standard on a case-by-case basis, considering such factors as the need to preserve failed or failing stations, to promote the digital broadcasting transition in medium and small markets, and to maintain existing, or permit the establishment of new, local news operations at stations struggling with the increasing costs of providing local news.

Finally, NAB argues that the Commission has no statutory authority – as well as no basis grounded in either diversity or competition concerns – to override Congress' judgments in the 1996 Act about ownership consolidation in local radio markets. Congress' determinations as to the appropriate levels of local radio ownership set forth in Section 202(b)(1) of the 1996 Act are definitive, and the Commission must accordingly approve, without delays or the imposition of any additional public interest requirements, proposed radio transactions that comply with these statutory numerical limits. NAB furthermore emphasizes that the Commission should not attempt to cut back on the level of ownership concentration specifically allowed by Congress by changing, at this juncture, its long-standing method of defining radio markets and for counting the number of stations in a market.

The available empirical evidence, including the FCC's recently completed radio market studies, moreover provides no diversity- or competition-related justifications for thwarting congressional intent as to the allowable levels of local radio consolidation. Numerous studies conducted over the past several years have demonstrated that radio programming diversity has continued to increase since 1996. A variety of studies also indicate that even consolidated radio groups are unable to exercise undue market power in the radio marketplace, due to the volatility of ratings and audience shares received by radio stations, declining listening shares earned by even market leading stations, and increased competition from a variety of media outlets. Given the lack of reliable evidence in the record that increased ownership concentration has caused significantly higher advertising rates or other tangible harm in the marketplace, the Commission – even if it possessed the legal authority – simply has no basis upon which to decline to give full effect to the local radio ownership standards set forth in Section 202(b) of the 1996 Act.

For all the reasons set forth in detail in NAB's comments, the Commission should repeal the newspaper/broadcast cross-ownership rule and the radio/television cross-ownership rule; reform the television duopoly rule to permit duopolies in medium and small markets; and approve, without delays or the imposition of any additional public interest requirements, proposed radio station transactions that comply with the statutory local radio ownership limits.

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To: The Commission

COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters ("NAB")[1] submits these comments in response to the Commission's *Notice of Proposed Rulemaking* in this proceeding.[2] Pursuant to Section 202(h) of the 1996 Telecommunications Act, which requires the Commission to review its broadcast ownership rules every two years, the *Notice* initiated a comprehensive examination of

[1] NAB is a nonprofit incorporated association of radio and television stations and broadcast networks. NAB serves and represents the American broadcasting industry.

[2] *Notice of Proposed Rule Making* in MB Docket No. 02-277 and MM Docket Nos. 01-235, 01-317, and 00-244 (rel. Sept. 23, 2002) ("*Notice*").

all the multiple ownership rules.[3] As part of this comprehensive review, the Commission also released for comment 12 empirical studies examining the current state of the media marketplace, including how consumers use the media, how advertisers view different media outlets, and how media ownership affects diversity, localism and competition. To conduct its examination of its long-standing broadcast ownership rules, the Commission specifically requested comment on the following broad categories of issues:

(1) the legal framework for its ownership review, especially the statutory language of Section 202(h) and the standard that the FCC should use in determining whether to modify, repeal or retain its ownership rules under this section;

(2) the characteristics of today's media marketplace, in particular the current status of competition in the marketplace;

(3) the policy goals of competition, diversity and localism and whether the ownership rules, or revisions to them, are required to advance these goals in today's media marketplace; and

(4) possible changes to each of the broadcast multiple ownership rules, including several proposed alternative means to achieve the Commission's goals of competition, diversity and localism.

In commenting on these complex legal and policy issues, NAB first addresses the marketplace developments and other general considerations that should inform the Commission's approach as it seeks to ensure that its local broadcast ownership rules still serve

[3] The *Notice* commenced review of the local television duopoly rule, the radio/television cross-ownership rule, the national television ownership rule and the dual network rule. It also incorporated pending rulemaking proceedings on the local radio ownership and newspaper/broadcast cross-ownership rules. In these comments, NAB addresses the four local ownership rules. NAB also joins with the Network Affiliated Stations Alliance in separate comments on the national television ownership rule. NAB takes no position on the dual network rule.

the public interest in a rapidly changing media environment. With these general considerations in mind, NAB then discusses the Commission's proposed alternatives to the current local ownership rules, and makes recommendations as to the retention, revision or elimination of each of these rules. Given the much less dominant position of local broadcasters in today's media marketplace, the retention of a thicket of broadcast-only local ownership restrictions – which were originally adopted in an era of broadcaster preeminence – is increasingly outmoded and unjustified.

I. The Commission Has A Clear Duty To Reevaluate The Broadcast Ownership Rules To Ensure They Still Serve The Public Interest In Today's Competitive Media Marketplace.

As an initial matter, NAB emphasizes that the Commission cannot avoid its responsibility to revise its ownership rules to reflect the dramatic changes that have occurred in the media marketplace over the past several decades – changes that the Commission itself has documented in this and previous rulemaking proceedings. *See infra* Section II. Courts have, as a matter of general administrative law, expressly held that "changes in factual and legal circumstances may impose upon the agency an obligation to reconsider a settled policy or explain its failure to do so." *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992) ("*Bechtel I*").[4] After decades of experience with the multiple ownership rules, any reviewing court would, moreover, expect the Commission to be able to produce "evidence" indicating that the rules "achieve[]" the diversity, competition and localism "benefits that the Commission attributes to" them. *Bechtel v. FCC*, 10 F.3d 875, 880 (D.C. Cir. 1993) ("*Bechtel II*") (court invalidated a FCC criterion for licensing broadcast applicants because, after 28 "years of experience with the policy," the Commission

[4] *Accord Geller v. FCC,* 610 F.2d 973, 980 (D.C. Cir. 1979) (cable television rules originally implemented to facilitate enactment of new copyright legislation could not continue to be adhered to once that "predicate disappear[ed]," absent a showing that the rules served the public interest in some other manner).

had "no evidence to indicate that it achieves even one of the benefits that the Commission attributes to it"). Clearly the Commission now bears the burden of affirmatively justifying retention of the ownership rules in their current form by empirically demonstrating their benefits in today's marketplace.[5]

But even beyond the Commission's general "duty to evaluate its policies over time," especially if "changes in factual and legal circumstances" occur, *Bechtel I*, 957 F.2d at 881, Section 202(h) of the Telecommunications Act of 1996 ("1996 Act") directs the Commission to review all of its ownership rules biennially to determine if they "are necessary in the public interest as the result of competition." Pub. L. No. 104-104 § 202(h), 110 Stat. 56 (1996). This section also requires the Commission to "repeal or modify any regulation it determines to be no longer in the public interest." *Id*. Thus, the Commission has an explicit statutory duty to reexamine its broadcast ownership rules every two years, in light of competitive changes in the marketplace, to determine whether their retention serves the public interest.

In addition, it is clear that Congress had a deregulatory intent when adopting Section 202(h).[6] Certainly the purpose of the 1996 Act was to "promote[] competition and reduce[] regulation," and Congress expressly sought to "promote the competitiveness" of broadcast stations in a multichannel media market by "depart[ing] from the traditional notions of broadcast regulation" and "rely[ing] more on competitive market forces." H.R. Rep. No. 204, 104th Cong.,

[5] *See Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455, 1457 (D.C. Cir. 1985) (court invalidated cable must carry rules because the FCC had, in 20 years after rules' original promulgation, never substantiated with empirical evidence the speculative assumptions underlying the rules); *Bechtel II*, 10 F.3d at 880 (rather than relying on "unverified predictions," FCC needed to produce evidence to support long-standing rule).

[6] *See* Separate Statement of Commissioner Michael K. Powell, *1998 Biennial Review Report*, 15 FCC Rcd 11058, 11151 (2000) ("*Powell Biennial Review Statement*") ("the clear bent of the biennial review process set out by Congress is deregulatory, in recognition of the pace of dramatic change in the marketplace and the understanding that healthy markets can adequately advance the government's interests in competition and diversity").

2d Sess. 47-48, 55 (1995). In interpreting Section 202(h) specifically, the D.C. Circuit Court of Appeals has found that the biennial review provision was designed "to continue the process of deregulation." *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148, 159 (D.C. Cir. 2002), *quoting Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1033 (D.C. Cir. 2002).

Despite Congress' deregulatory intent, Section 202(h) cannot, however, fairly be read as requiring that the Commission demonstrate an ownership rule to be indispensable or essential so as to justify its retention. *See Notice* at ¶ 18 (requesting comment on meaning of the term "necessary" in Section 202(h)). Such an interpretation of the phrase "necessary in the public interest" would, in effect, require the Commission to meet a more demanding standard to retain a rule under Section 202(h) than to adopt that rule in the first instance, which would be fundamentally illogical, as well as inconsistent with decades of precedent from the D.C. Circuit and Supreme Courts interpreting identical language in other provisions of the Communications Act of 1934 (the "Act").

As the Commission has previously explained in detail,[7] neither the phrase "necessary in the public interest" nor the word "necessary" is unique to Section 202(h). Section 201(b) of the Act, in language identical to that of Section 202(h), provides that the FCC "may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." 47 U.S.C. § 201(b). Other provisions conferring rulemaking authority on the Commission employ very similar language,[8] and several additional provisions of the Act authorize the

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[7] *See* FCC, Petition for Rehearing or Rehearing En Banc, *Fox Television Stations, Inc. v. FCC*, No. 00-1222 (D.C. Cir. April 19, 2002).

[8] *See* Section 4(i), 47 U.S.C. § 154(i) ("The Commission may . . . make such rules and regulations, . . . not inconsistent with this Act, as may be necessary in the execution of its functions."); Section 303(r), 47 U.S.C. § 303(r) (Commission may "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act.").

Commission to act "in the public interest, convenience, and necessity."[9] Numerous decisions of the D.C. Circuit Court of Appeals and the Supreme Court have, moreover, discussed the standard that applies to Commission actions under Sections 201(b), 4(i), 303(r) and others of the Act, and these decisions clearly establish that the term "necessary" in the Communications Act does not mean "indispensable" or "essential" but "appropriate" or "proper." For example, in *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978), the Supreme Court stated that the Commission is authorized by Section 303(r) to promulgate "such rules and regulations . . . not inconsistent with law, as may be *necessary* to carry out the provisions of [the Act]," and held that this statutory grant of authority confers on the Commission broad discretion, notwithstanding use of the term "necessary," to implement its view of the public interest standard "so long as that view is based on consideration of *permissible* factors and is otherwise *reasonable*." *Id*. at 793 (emphasis added).[10] Numerous judicial decisions construing the statutory phrase "public interest, convenience, and *necessity*" in cases examining the scope of the

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[9] *See, e.g.,* Sections 307(a) and 309(a), 47 U.S.C. §§ 307(a), 309(a) (authorizing FCC to license broadcasters and act upon applications for broadcast licenses).

[10] *See also AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 378 and note 5 (1999) (Court construed Section 201(b) as constituting a "general grant of rulemaking authority," and did not read into that section's "necessary in the public interest" language any special or higher standard); *Mobile Communications Corp. v. FCC*, 77 F.3d 1399, 1406 (D.C. Cir. 1996) (internal citations omitted) (a rule "would be 'necessary in the execution of [the Commission's] functions' under 4(i) so long as the Commission properly found it necessary to 'ensure the achievement of the Commission's statutory responsibilit[y]' to grant a license only where the grant would serve the public interest," and the court accords "substantial deference" to the FCC's judgment regarding how the public interest is best served).

FCC's regulatory discretion have likewise not indicated that "necessity" implies indispensability.[11]

In sum, for decades the courts have recognized that the touchstone for assessing the substantive validity of the Commission's rules is whether they *serve* the public interest, not whether they are strictly *necessary* (in the sense of essential or indispensable) in the public interest.[12] There appears no sound reason to interpret the term "necessary" in Section 202(h) inconsistently with the meaning given to that same word in numerous court decisions construing the Act's other provisions, including Sections 4(i), 201(b) and 303(r) granting the FCC rulemaking authority. Indeed, it would be flatly illogical to assume that Congress intended to authorize the Commission to adopt new rules under one meaning of the term "necessary," but then to require in Section 202(h) that the rules be modified or repealed two years later if those rules fail to satisfy a different, stricter meaning of the term "necessary." Nothing in Section 202(h) suggests that Congress intended such an anomalous result, and the full text of Section 202(h) indicates otherwise.[13] Had Congress intended to work such a significant alteration in a standard established by decades of precedent, surely Congress would have plainly and clearly expressed that objective. The fact that Congress in Section 202(h) made no reference to such an

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[11] *See, e.g., FCC v. WNCN Listeners Guild*, 450 U.S. 582, 593-96 (1981); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940); *WOKO, Inc. v. FCC*, 109 F.2d 665, 667 (D.C. Cir. 1939).

[12] *See, e.g., National Broadcasting Co. v. U.S.*, 319 U.S. 190, 225 (1943) (discussing scope of FCC's rulemaking authority over broadcast networks under Section 303 of the Act and observing that "[i]f time and changing circumstances reveal that the 'public interest' is not *served* by application of the [challenged ownership and other] Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations") (emphasis added).

[13] The first sentence of the section requires the FCC to determine biennially whether its ownership rules "are necessary in the public interest as the result of competition." The second sentence then directs the FCC to "repeal or modify any regulation it determines to *be no longer in the public interest*." Thus, the text of Section 202(h) equates the meaning of the phrase "necessary in the public interest" with simply being in the public interest.

objective suggests that it did not intend to change radically the traditional public interest standard.[14]

Accordingly, the Commission should interpret Section 202(h) as requiring the repeal or modification of its existing broadcast ownership regulations if they no longer serve the public interest in light of current competitive conditions in the media marketplace. As discussed in detail below, NAB believes that several of the local ownership rules – which were originally adopted decades ago in a vastly different media environment – do in fact fail to serve the public interest today.

II. The Proliferation Of Outlets Has Radically Altered The Media Marketplace Since The Commission Began Regulating Broadcast Ownership Decades Ago.

The Commission originally adopted its local ownership rules decades ago when media markets were dominated by a relatively small number of broadcasters offering a single channel of programming each. The tremendous growth in the number and variety of media outlets, and the concomitant decline in the dominance of traditional broadcasters in the mass media marketplace, during the past several decades have been documented on many occasions. *See Notice* at ¶¶ 23-28 (describing the "modern media marketplace"). NAB will attempt only a brief summary of these changes here.

By September 2002, the Commission had licensed 13,296 radio stations, 1,714 full power television stations, 2,127 low power television stations and 568 Class A stations. FCC News Release, *Broadcast Station Totals as of September 30, 2002* (Nov. 6, 2002). In contrast, in 1975 when the Commission adopted the "newest" local ownership rule (the newspaper/broadcast cross-ownership ban), there were only 7,785 radio stations and 952 television stations licensed in

[14] *See Whitman v. American Trucking Association, Inc.*, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague or ancillary provisions – it does not, one might say, hide elephants in mouseholes").

the United States.[15] Beyond this growth in the number of traditional broadcasters, new video and audio distribution technologies have altered the media landscape even more dramatically in recent decades. Today, cable television systems, Direct Broadcast Satellite ("DBS"), and other multichannel video programming distributors ("MVPDs") provide dozens, if not hundreds, of channels of programming to over 80% of all television households in the nation.[16] And the recent development of satellite radio services allows consumers to obtain dozens of additional channels of radio programming in a wide variety of formats.[17]

As documented in a number of studies, the growth of media outlets in individual markets has also been impressive. For example, a comprehensive examination of traditional media "voices" in each of the nation's 210 Designated Market Areas ("DMAs") in 2001 found that, on average, each DMA was home to 81 media voices for which there were 39 separate owners.[18] Another recent study examined the number of local media outlets available in five different

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[15] *Order and Notice of Proposed Rule Making* in MM Docket Nos. 01-235 and 96-197, FCC 01-262 at ¶ 9 (rel. Sept. 20, 2001).

[16] *See* J. Levy, M. Ford-Livene, and A. Levine, OPP Working Paper Series #37, *Broadcast Television: Survivor in a Sea of Competition* at 3 (Sept. 2002) ("*OPP Video Study*").

[17] *See* Paige Albiniak, *Radio Set to Fly*, Broadcasting & Cable at 26 (Sept. 3, 2001) (XM and Sirius, the two satellite radio services, each offer 100-plus channels of music, news, talk and sports).

[18] *See* Comments of Hearst-Argyle Television, Inc. in MM Docket Nos. 01-235 and 96-197 at 5-10 (filed Dec. 3, 2001) ("*Hearst-Argyle Media Voices Survey*"). This survey counted full power television stations, low power and Class A stations that originate programming, radio stations, daily newspapers, cable systems, and DBS providers with uplink facilities by which they offer local-into-local service. In a similar survey in 1998, NAB found that the average television market had 12.4 television stations, 84.1 commercial radio stations, and 18.3 newspapers that reached 1,000 or more in circulation (13.6 of which were published within the market and 2.9 of which reached a minimum of 5% penetration). At that time, the average market also had a 23.6% penetration of weekly newspapers and 10.2 national magazines that reached a 5% penetration. *See* Comments of NAB in MM Docket No. 98-35, Appendix A, *Media Outlets by Market-Update* (filed July 21, 1998).

communities over time, and found that the number of outlets had steadily increased over the years in all of the communities and that the rate of increase in the number of outlets actually rose after passage of the 1996 Act.[19] These studies are consistent with the Commission's own study conducted just a few months ago, which compared the availability and ownership of media outlets in ten different Arbitron radio markets from 1960 to 2000. The Commission found that the increase in the number of outlets averaged almost 200 percent across all ten markets over the 40-year period, and that the increase in the number of owners averaged 140 percent.[20]

These and other studies together show that there has been a vast proliferation of media outlets in recent decades, and that a wide array of outlets now exists even in smaller markets.[21] Moreover, these various studies demonstrate that, despite recent ownership consolidation in the broadcast industry, the number of independent owners of media outlets has remained substantial, and, according to the *FCC Media Outlet Study*, has actually increased significantly since 1960.[22] A study previously conducted by NAB similarly showed that the overall impact of the recent consolidation in the broadcast industry might be less dramatic than commonly assumed. Despite

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[19] *See* David Pritchard, *A Longitudinal Study of Local Media Outlets in Five American Communities*, Appendix A, Comments of Viacom Inc. in MM Docket Nos. 01-317 and 00-244 (filed March 27, 2002) (examining Lisbon, North Dakota; Florence, South Carolina; Rockford, Illinois; Syracuse, New York; and New York, New York in 1942, 1962, 1982, 1995, and 2002).

[20] Scott Roberts, Jane Frenette and Dione Stearns, *A Comparison of Media Outlets and Owners for Ten Selected Markets (1960, 1980, 2000)* (Sept. 2002) ("*FCC Media Outlet Study*") (counting the number of broadcast stations, cable systems, DBS systems and daily newspapers).

[21] *See, e.g.*, *FCC Media Outlet Study* at Table 1 (in 2000, finding 53 media outlets in the Burlington, Vermont radio market, 33 outlets in Terre Haute, Indiana, and 23 in Altoona, Pennsylvania, which are the 141st, 197th and 253rd ranked Arbitron markets, respectively); *Hearst-Argyle Media Voices Survey* at Exhibit 1 (finding 91 total voices in the Yakima, Washington television market, 53 voices in the Rapid City, South Dakota market, and 36 in the Casper, Wyoming market, which are the 125th, 175th and 200th ranked DMAs, respectively).

[22] *See also Hearst-Argyle Media Voices Survey* at 7 (finding, on average, that each DMA has 39 separate owners of media outlets).

the substantial consolidation that has occurred in the radio industry since 1996, a large number of commercial radio stations either remain "standalones," or are part of local duopolies, in their respective markets.[23] In the ten largest Arbitron markets, for instance, 25.6% of the commercial radio stations are standalones, and an additional 13.6% of the stations are in local duopolies. In a number of smaller market groupings, the percentages of standalone stations and those in local duopolies are even higher and, in some market groups, approach 50%.[24] Thus, recent consolidation within sectors of the broadcast industry cannot obscure the growth in competition between the ever-increasing number of broadcast outlets and between broadcasting and various newer media and technologies.

Indeed, NAB emphasizes that the studies discussed above seriously undercount the number of competing media outlets currently available to consumers in local markets. The *FCC Media Outlet Study* did not, for example, consider Class A and other low power television stations, satellite or low power radio, weekly newspapers, local or national magazines, or the Internet.[25] These studies also counted cable systems as only a single outlet, even though they

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[23] NAB, *Independent Radio Voices In Radio Markets* (Nov. 2001), Attachment B to NAB Comments in MM Docket Nos. 01-317 and 00-244 (filed March 27, 2002) ("*Radio Voices Study*").

[24] For instance, in markets 11-25, nearly half (49.4%) of the commercial radio stations are standalones (28.5%) or are part of a local duopoly (an additional 20.9%). Similarly, 46.4% of the commercial radio stations in markets 26-50 fall in these categories. Overall, more than 40% of all commercial stations in Arbitron markets are either standalone or duopoly stations within their respective markets. *Radio Voices Study* at 1.

[25] Similarly, the *Hearst-Argyle Media Voices Survey* was conservative in its estimates of available media voices because it did not consider the Internet, low power or satellite radio, magazines, or weekly, foreign or other specialty newspapers. Recent studies have in particular recognized the marketplace significance of weekly newspapers, especially away from central metropolitan areas. *See, e.g.*, S. Lacy, D.C. Coulson and H. Cho, *Competition for Readers Among U.S. Metropolitan Daily, Nonmetropolitan Daily, and Weekly Newspapers*, 15 J. Media. Econ. 21, 38-39 (2002).

offer dozens (if not hundreds) of separate channels to consumers, including a number of national (*e.g.*, CNN, MSNBC, CNBC, C-SPAN, Fox News Channel) and local or regional cable news services.[26] And as Chairman Powell has stated, cable should not be dismissed as a source of local programming in local markets; most cable systems offer community PEG channels and many air local school sporting events.[27] The FCC's and other studies additionally failed to consider the Internet as even a single voice in any local market, despite the well documented growth in Internet accessibility and use.[28] Considering that the Internet and the World Wide Web allow consumers anywhere to access "content" (including news and political information) as "diverse as human thought," *Reno v. ACLU*, 521 U.S. 844, 870 (1997), surely the Internet must be included in any compilation of media voices.

Perhaps less obviously, surveys such as the *FCC Media Outlet Study* significantly underestimate the number of outlets – and thus the level of diversity – available to consumers in local media markets because they fail to consider the substantial number of "out of market" radio

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[26] There are now dozens of local and regional cable news channels across the country. For partial listings of these cable news operations, see www.ncta.com/industry_overview/programList.cfm and www.rtnda.org/resources/nonstopnews/executive.html.

[27] *See Powell Biennial Review Statement*, 15 FCC Rcd at 11156 (asserting that cable should not be rejected "as a viable medium for local content," in part because systems are franchised locally and "local community services" can be extracted by local regulators "as a condition of receiving" a franchise).

[28] Internet households are already the majority, as 55% of all households use home computers to go online (Statistical Research, Inc., Spring 2002 Home Technology Monitor Ownership Report), and over 72% of Americans currently have Internet access. Alec Klein, *Internet Use Seems to Cut into TV Time*, Washington Post at E01 (Nov. 29, 2001) (citing UCLA Internet Report 2001). By 2005, 68.4 million households, or 63% of all American homes, are expected to be online. *Veronis Suhler Releases 15th Annual Communications Industry Forecast*, PR Newswire (Aug. 6, 2001). Currently 35% of Americans go online for news at least once a week, and persons under 30 use the Internet for news to a much greater degree. *See* Survey Report, Pew Research Center for the People & the Press, *Public's News Habits Little Changed by September 11* at 2, 13 (June 9, 2002) ("*2002 Pew News Report*").

and television outlets routinely accessed by consumers. A new study by BIA Financial Network has confirmed that listeners are able to receive many more radio stations than those assigned to their Arbitron markets, and, as a result, there is a considerable amount of listening in markets to stations that are not listed by Arbitron as being "home" to that market. In fact, on average, just over two-thirds (67.7%) of the listening within a market is attributable to commercial radio stations listed by Arbitron as being "home" to that market.[29] And in some Arbitron markets most of the radio listening is to stations that Arbitron does *not* assign to the listeners' geographic market. *See BIA Out-of-Market Voices Study* at 8 (in Ann Arbor, Michigan, for example, home to market stations receive only 10.4% of the listening). Significantly, this study also showed that the level of listening to in-market radio stations *decreases* with market size. *Id*. at 7-8 (in Arbitron markets ranked 1-10, 83.5% of the listening was to in-market stations, but "home" market stations received only 64.4% of the listening in markets 101+). Thus, consumers in smaller Arbitron markets that have relatively fewer radio stations more frequently access out-of-market radio stations, thereby enhancing the diversity of their radio programming choices.

Because television markets (DMAs) are generally larger than Arbitron radio markets, the levels of out-of-market television viewing are generally lower than the above-described levels of out-of-market radio listening. However, the viewing of out-of-market broadcast television stations is still significant in a number of DMAs, especially smaller ones. In May of 2002, there were 67 DMAs in which television stations from adjacent DMAs received a reportable viewing share, and, in some smaller markets, over 25% of the total television viewing was of stations

[29] *See* Attachment A, BIA Financial Network, *Out-of-Market Listening and Viewing: It's Not to be Overlooked* at 6 (Jan. 2003) ("*BIA Out-of-Market Voices Study*"). This study also noted that the total amount of listening to in-market radio stations declined by 2.5% from the Spring of 1998 to the Spring of 2002.

located in adjacent DMAs. *BIA Out-of-Market Voices Study* at 12-14.[30] And with the growing number of available cable channels, as well as adjacent and other market broadcast television stations carried on cable systems, the viewing of in-market television stations has steadily decreased in recent years.[31] Clearly consumers in smaller DMAs, which have relatively fewer television stations, are able to obtain a greater diversity of television programming by accessing both cable channels and additional broadcast stations located outside of their DMAs. In sum, surveys such as the *FCC Media Outlet Study* (which counted certain media outlets within Arbitron markets) and the *Hearst-Argyle Media Voices Survey* (which counted voices in DMAs), significantly underestimated the number of media voices available to consumers because they failed to count out-of-market radio and television stations that are easily and routinely accessed by consumers.

Given the vast array of broadcast and other outlets available to consumers in markets of all sizes, it is clear that the modern media marketplace bears little resemblance to the media environment of decades past. The Commission must therefore seriously consider whether its local broadcast ownership rules – which were originally adopted in a marketplace characterized by the preeminence of a relatively limited number of broadcasters – continue in their current form to serve the traditional goals of competition, diversity and localism.

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[30] These markets include Lafayette, IN, Mankato, MN, Zanesville, OH, St. Joseph, MO and Harrisonburg, VA. Television stations from adjacent DMAs received one-third or more of the viewing in Lafayette and Mankato. Even some larger markets such as Providence, RI (DMA #48) show a significant amount of out-of-market television viewing. *BIA Out-of-Market Voices Study,* Table 2 (adjacent television stations received total day share of 14 in Providence DMA).

[31] *See BIA Out-of-Market Voices Study* at 15-16 (in the smallest DMAs (101+), less than 40% of the markets' total day viewing is now attributable to local broadcast television stations, and in the top ten DMAs, less than 60% of the markets' viewing is attributable to local broadcast television stations).

III. The Commission Must Reconsider How Best To Achieve Its Policy Goals Of Competition, Diversity And Localism In Light Of The Proliferation Of Media Outlets.

A. The Proliferation of Media Outlets Has Produced a Highly Competitive Media Market that Better Serves Consumers, Thereby Undercutting the Competition Rationale for Retaining Broadcast-Only Local Ownership Restrictions.

Due to the proliferation of media outlets and technological advancements, competition in today's mass media marketplace has been accurately characterized as "relentless."[32] The *Notice* (at ¶ 54) specifically inquired as to the effect of this proliferation on the Commission's competition goals. As discussed below, NAB believes that the increased number of broadcast and nonbroadcast outlets has improved service to the public, and that the primary competition-related concern in today's marketplace is the continued ability of local broadcasters to compete effectively in a digital, multichannel environment.

As the Commission has consistently stressed, competition – rather than regulation – "has the greatest potential to bring consumer welfare gains of lower prices," improved "service quality" and more "future innovation." *Hearing Designation Order* in CS Docket No. 01-348, FCC 02-284 at ¶¶ 276, 280 (rel. Oct. 18, 2002) ("*Echostar Order*"). The dramatic increase in the number of television and radio stations over the past several decades has in fact improved service to the public, particularly by widening the array of viewing and listening choices available in local markets. And it is not only entertainment programming choices that have expanded. Empirical studies have demonstrated that, as competition between television stations increased during the 1980s and 1990s, their commitment to local news also increased. For example, one study demonstrated that an increase in the number of television stations in a market was positively related to the minutes of local news, as well as the minutes of all local programming,

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[32] Amy Korzick Garmer, *American Journalism in Transition: A View at the Top*, A Report of the Fifth Annual Aspen Institute Conference on Journalism and Society at 2 (2001).

provided by stations in that market.[33] Another study similarly showed that, as competition (measured by Nielsen ratings) intensified between television newscasts in local markets, overall resources (both expenditures and staff) allocated to these newscasts increased.[34] A recent study confirmed that the number of competitors in the local television news market significantly increased between 1989 and 1998 in large, medium and small markets, and that stations in large, medium and small markets responded to this increased competition by increasing the number of newscasts they aired each day.[35]

Similarly, the competition resulting from the increase in the number of radio stations during the past decades has benefited consumers by making more programming choices available. The Commission recognized a decade ago that, due to "intense inter- and intra-industry competition, radio station programming has become increasingly diverse," with the number of programming formats increasing dramatically.[36] A study of radio programming covering 1975 through 1995 showed "a pronounced upward trend in the number of formats reported over this period."[37] Assuming the "number of identifiable formats" to be "a broad"

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[33] John C. Busterna, *Television Station Ownership Effects on Programming and Idea Diversity: Baseline Data*, 1 J. Media Econ. 63, 65-66 (Fall 1988).

[34] S. Lacy, T. Atwater and X. Qin, *Competition and the Allocation of Resources for Local Television News*, 2. J. Media Econ. 3, 11 (Spring 1989).

[35] Angela Powers, *Toward Monopolistic Competition in U.S. Local Television News*, 14 J. Media Econ. 77, 82 (2001). This study also found that market shares for local broadcast news decreased between 1989 and 1998 in small, medium and large markets, reflecting an increase in competition. *Id*. at 83.

[36] *Report and Order* in MM Docket No. 91-140, 7 FCC Rcd 2755, 2758 (1992), *recon. granted in part, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 7 FCC Rcd 6387 (1992) ("*1992 Radio Ownership Order*") (noting that by one count the number of major programming formats had increased from eight to 35 since the 1970s).

[37] Thomas W. Hazlett and David W. Sosa, *Was the Fairness Doctrine A "Chilling Effect"? Evidence from the Postderegulation Radio Market*, 26 J. Legal Stud. 279, 292 (1997).

measure of programming diversity, this study concluded that "the overall trend is toward an increase in program listening choices." Hazlett and Sosa, *Was the Fairness Doctrine a "Chilling Effect"?* at 292. Given the FCC's particular concerns about the availability of news and informational programming, NAB emphasizes that this growth in the number of programming formats included an "explosion in news, talk, and public affairs formats, on both AM and FM," between 1975 and 1995.[38] "The share of informational formats on FM increased from 4.64 percent in 1975 to 7.39 percent in 1995, but the more dramatic increase was in the AM band where the share of informational programming went from 4.29 percent to 27.60 percent." Hazlett and Sosa, *Chilling the Internet?* at 16.

Beyond the increase in consumer choices resulting from competition between proliferating broadcast outlets, the development and growth of new multichannel video and audio programming distributors (especially cable television, DBS and satellite radio) have provided more programming and service choices to viewers and listeners.[39] The rise of these multichannel distribution technologies has also dramatically increased the level of competition facing television and radio broadcasters. As the Commission just recently reported, traditional broadcasters no longer enjoy a preeminent position in the media marketplace but are swimming "in a sea of competition," as "DBS and the expansion in cable availability and channel capacity

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According to this study, in 1975 music programming "was dominated by only a few formats such as country-western and adult contemporary." By 1995, there were "more than 20 specific" music formats, including "urban contemporary, new age, and bluegrass." *Id*.

[38] Thomas W. Hazlett and David W. Sosa, *Chilling the Internet? Lessons from FCC Regulation of Radio Broadcasting*, Cato Policy Analysis No. 270 at 5 (March 1997).

[39] *See* August Grant, *The Promise Fulfilled? An Empirical Analysis of Program Diversity on Television*, 7 J. Media Econ. 51 (1994) (demonstrating that, as the number of channels of television programming increases, the diversity of program types offered also increases). The Commission itself has documented the extensive programming and service offerings of cable and DBS system operators. *See OPP Video Study* at 40-44, 56-59.

have created an increasingly competitive environment for television broadcasting."[40] Indeed, by 2001 "cable accounted for close to half of all-day viewing over all television households." *OPP Video Study* at 20. Cable has clearly already "cut substantially into the broadcast audience," and the Commission has predicted that "broadcast [viewing] shares are likely to continue to fall." *Id.* at 20, 22.[41]

Some analysts have similarly predicted that satellite radio services will ultimately "transform the [radio] medium to the same degree cable transformed television." Neil Irwin, *XM Raises the Baton*, Washtech.com (Sept. 8, 2001). But even before the advent of satellite radio, the listening shares earned by market leading radio stations had generally declined, no doubt from increased inter- and intra-industry competition.[42] In such a competitive environment, where broadcasters face "continuing audience fragmentation" and "pressure on broadcast advertising revenues," *OPP Video Study* at ii, the retention of a thicket of *broadcast-only* local ownership restrictions is increasingly outmoded and unjustified.

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[40] *OPP Video Study* at ii. This study also identified a number of other competing video programming sources (including videos, DVDs, computer and video games, and Internet video streaming), and stated that the "cumulative effect of these alternatives may become considerable." *Id.* at 75.

[41] *Accord* Testimony of Victor Miller IV of Bear, Stearns & Co., Inc., Transcript of FCC En Banc Hearing on Local Broadcast Ownership at 31-32 (Feb. 12, 1999) (testifying that the "local, free, over-the-air broadcast TV business is becoming progressively more difficult" as "video competition" fragments viewership and "single-channel" local broadcasters "compete for advertising, programming, viewers, and talent against . . . multichannel operators").

[42] *See Aggregate Shares of the Top Five Stations in Arbitron's Top 100 Markets: Spring 2001 vs. Spring 1996*, Attachment D to NAB Comments in MM Docket Nos. 00-317 and 00-244 (filed March 27, 2002) (across the top 100 Arbitron markets, the top five radio stations' aggregate listening shares declined an average of 9.1% from 1996 to 2001) ("*Radio Shares Study*"). *See also* George Williams and Scott Roberts, *Radio Industry Review 2002: Trends in Ownership, Format, and Finance* at 19 (Sept. 2002) ("*FCC Radio Trends Report*") (showing that the average number of listeners to radio has fallen slightly in last few years, possibly from "radio listeners choosing to spend more time listening to CDs or downloaded MP3s").

As early as the 1980s, the Commission expressly recognized that the emergence of "new technologies, coupled with the continued growth in the number of television [and radio] stations, will create" an ever "more competitive" "economic environment," and that "this increased level of competition" will "ensure the presentation" of a variety of informational and other programming, thereby causing a "decline" in the "need" for the continued regulation of broadcasters.[43] NAB submits that the Commission's prediction has come true – the growth of both traditional broadcast outlets and new programming distribution technologies has produced a highly competitive media marketplace, which offers a vast array of service and programming options to consumers in local markets. In this economically competitive marketplace, broadcast-only local ownership rules – which were intended to ensure that consumers received the benefits flowing from competition in a broadcaster-dominated environment – are much less relevant.

Indeed, the development and rapid growth of alternative video and audio delivery systems require the Commission to consider whether broadcast-only ownership restrictions continue to serve its competition goals, or whether they actually inhibit broadcasters from competing vigorously with their multichannel competitors in local markets. For example, the newspaper/broadcast cross-ownership rule prohibits the owner of a single radio station from having an attributable interest in a daily newspaper in the same market, while a cable system operator with a monopoly position in the local MVPD market faces no restrictions in acquiring a daily newspaper in the same market. Similarly, a cable system operator – who controls the distribution of dozens or even hundreds of video programming channels, as well as the "essential

[43] *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, Report and Order* in MM Docket No. 83-670, 98 FCC 2d 1076, 1086, 1099 (1984), *recon. denied*, 104 FCC 2d 358 (1986), *rev'd in part, ACT v. FCC*, 821 F.2d 741 (D.C. Cir. 1987) ("*Television Deregulation Order*").

pathway" into consumers' homes[44] – is now able to acquire a broadcast television station in the same market, unlike the owner of a single broadcast television station who cannot, under the television duopoly rule, acquire control of a license for a second broadcast channel in most markets. Certainly in the current multichannel environment dominated by highly consolidated cable and DBS system operators, the ability of local broadcasters to "obtain[] and exercis[e] market power" is constrained, thereby undercutting the rationale for broadcast-only local ownership rules.[45]

To best achieve the Commission's goals of a competitive marketplace that brings "lower prices," improved "service quality" and more "innovation," *Echostar Order* at ¶¶ 276, 280, the Commission should now structure its local media ownership rules so that traditional broadcasters and newer programming distributors can all vigorously compete on an equitable playing field. The modification or elimination of broadcast-only ownership restrictions that are irrelevant or even counter-productive in a digital, multichannel media environment will help ensure the continued ability of broadcasters to survive – and even thrive – "in a sea of competition." *OPP Video Study* at i. Ensuring an economically viable broadcast industry will benefit consumers both by enhancing competition in local media markets,[46] and by enabling broadcasters to offer

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[44] *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 656 (1994).

[45] *Report and Order* in MM Docket Nos. 91-221 and 87-8, 14 FCC Rcd 12903, 12916 (1999) ("*Local TV Ownership Order*") ("the Commission's structural ownership rules and policies have been aimed at precluding broadcasters from obtaining and exercising market power"). *See also* Attachment E, Wachovia Securities, *Chart of Revenue Shares of Media Sectors* (showing radio and television broadcasting to be much less consolidated than other media sectors, including cable, DBS, movie studios, movie theaters and outdoor media).

[46] *See, e.g.*, David D. Haddock and Daniel D. Polsby, *Bright Lines, The Federal Communications Commission's Duopoly Rule, and the Diversity of Voices*, 42 Fed. Comm. L.J. 331, 332-33 (1990) (arguing that the television duopoly rule is in part responsible for the "feebleness of the competition offered" by television broadcasters to cable, and that competitive "pressure" on the

new and innovative services to the public. *See Notice* at ¶ 68 (inquiring how ownership rules affect innovation by broadcasters).

Consumers in particular will benefit from the timely completion of the digital television transition, which will enable broadcasters to offer an array of new innovative services, including high definition television, multicasting, and supplementary services such as Internet access, computer software distribution, data transmission, teletext, interactive services and paging services. But as discussed in greater detail below, completing the digital transition will be an expensive undertaking, and modification of the local broadcast ownership restrictions, particularly the television duopoly rule, will aid broadcasters (especially those in smaller markets) in bearing the costs of this transition. *See infra* Section V.C.[47] Given the "intense competition in video programming," the Commission has recognized that "it is desirable to encourage broadcasters to offer digital television as soon as possible." *Fifth Report and Order* in MM Docket No. 87-268, 12 FCC Rcd 12809, 12812 (1997). Reform of the decades-old restrictions on local broadcast ownership will accordingly aid the Commission in ensuring the continued economic viability of television broadcasting and its ability to compete effectively in a multichannel environment by offering innovative digital services to consumers.

Ensuring an economically competitive broadcast industry by the reform of outdated ownership restrictions on local broadcasters will also promote the Commission's goal of localism. *See Notice* at ¶¶ 5, 69 (highlighting localism as important policy goal that FCC seeks

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"potentially monopolistic behavior of cable TV systems" could be intensified if the duopoly rule were modified).

[47] Of course, the Commission must also, as NAB has previously emphasized, take additional steps to ensure a successful and expeditious digital transition. Above all, the Commission must adopt must-carry regulations for digital television signals. *See, e.g*., Comments of NAB in MM Docket No. 00-39 (filed May 17, 2000); Reply Comments of NAB in MM Docket No. 00-39 (filed June 16, 2000).

to advance in this proceeding). Broadcast stations serve their local communities by airing significant amounts of national and local news and public affairs programming, other informational programming, and local programming.[48] But beyond offering free, over-the-air entertainment and informational programming, broadcasters collectively serve their communities by providing literally billions in additional community service. In 2001, broadcast stations contributed nearly $10 billion in community service nationwide.[49] Approximately $6.6 billion of this amount consisted of the value of airtime that local radio and television stations contributed for public service announcements ("PSAs"). During 2001, the average radio and television station ran, respectively, 189 and 140 PSAs per week, and 64% of the radio PSAs and 56% of the television PSAs pertained to local community issues, including health, education and safety issues, alcohol and drug abuse prevention, children's issues, poverty and homelessness, and many others. *Community Service Report* at 5-6.

The value of local broadcasters' fundraising efforts for charitable causes or needy individuals approached $2.1 billion in 2001, during which 92% of local stations participated in such charitable activities. The average radio station that raised funds for charitable causes raised approximately $106,000, while the average television station raised almost $950,000. Local broadcasters in 2001 also raised about $1.2 billion for victims of natural disasters and the

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[48] *See, e.g.*, Comments of Belo in MM Docket No. 99-360 (filed March 27, 2000) (programming study showed that television broadcasters, in a wide range of markets, provide very substantial amounts of non-entertainment programming, including newscasts, news/information programs, public affairs shows, instructional programs, children's educational programming and religious programs, and that the network affiliated stations in the surveyed markets dedicated about *one-third of their total broadcast hours* to non-entertainment programming); Hazlett and Sosa, *Chilling the Internet?* at 16 (supply of informational programming formats on AM and FM radio has exploded both absolutely and as a proportion of all formats; in percentage terms, informational formats in AM radio alone increased nearly 21% between 1987 and 1995).

[49] National Association of Broadcasters, *A National Report on Local Broadcasters' Community Service* at 2 (June 2002) ("*Community Service Report*").

September 11, 2001 terrorist attacks, with more than 80% of radio and television stations reporting participation in disaster relief campaigns. *Id*. at 3, 5.

Finally, broadcasters serve their local communities – and indeed the nation – with innovative programs such as The AMBER Plan. Created in Dallas after the 1996 abduction and murder of nine-year-old Amber Hagerman, The AMBER Plan (America's Missing: Broadcast Emergency Response) is a voluntary partnership between law enforcement agencies and broadcasters to issue urgent bulletins via the Emergency Alert System in the most serious child abduction cases. Currently there are 78 local, regional and statewide AMBER plans in the nation, and, to date, these plans have been credited with successfully recovering 40 children.

The commitment of broadcast stations to their local communities is both apparent and significant. But to continue their local programming and other community service at or near their current levels, broadcasters must maintain their financial viability in an increasingly competitive media environment. As discussed in greater detail in Section V., the elimination or reform of certain ownership restrictions on local broadcasters (especially the newspaper cross-ownership prohibition and the television duopoly rule) will aid broadcasters substantially in remaining effective competitors in today's multichannel marketplace, in maintaining local news operations, and in continuing their significant service to local communities.

B. In Defining the Relevant Advertising Product Market as Part of a Competition Analysis, the Commission Should Continue to Recognize that a Broad Market Is Most Appropriate.

Assuming that, as part of its competition analysis in this proceeding, the Commission attempts to define the relevant product market for advertising, NAB urges the Commission to continue to recognize the appropriateness of broadly defining this market. *See Notice* at ¶ 61 (seeking comment on breadth of advertising product market). Specifically, the Commission should, in attempting to define the relevant product market for advertising, rely on its previous decisions indicating that the market includes a number of forms of media advertising, rather than just radio or television (or any other single medium) alone. Indeed, in many decisions over the course of more than a decade, the Commission has consistently utilized broad advertising product markets encompassing a number of media, and has generally not limited its consideration to advertising in particular, individual mediums.[50] Moreover, in previous decisions concerning the broadcast industry specifically, the Commission has expressly found that radio stations compete with non-radio outlets, including broadcast television and cable, "for audiences and advertising revenues." *1992 Radio Ownership Order*, 7 FCC Rcd at 2757, 2759 (finding that radio's share of the local advertising market had been flat throughout the 1980s, "even as the respective shares of *directly competitive media*, most notably local cable, increased") (emphasis added).[51]

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[50] *See, e.g., Notice of Inquiry, 1998 Biennial Regulatory Review* in MM Docket No. 98-35, 13 FCC Rcd 11276 at ¶ 5 (1998) (local advertising market consists of broadcast television, cable television, radio and newspapers); *In re Stockholders of Renaissance Communications Corporation*, FCC 97-98 at ¶ 48 (1997) (in evaluating request for newspaper/broadcast cross-ownership waiver, FCC utilized advertising product market of television and radio stations, newspapers and cable television systems); *In re Capital Cities/ABC, Inc*., FCC 96-48 at ¶ 94 (1996) (FCC utilized advertising product market of newspapers, cable television, broadcast television and radio in considering request for newspaper/broadcast cross-ownership waiver); *Further Notice of Proposed Rulemaking* in MM Docket Nos. 91-221 and 87-8, 10 FCC Rcd 3524, 3543 (1995) (local advertising market includes cable operators, broadcast television stations, radio stations and newspapers); F. Setzer and J. Levy, *Broadcast Television in a Multichannel Marketplace*, Office of Plans and Policy Working Paper No. 26, DA 91-817, 6 FCC Rcd 3996, 4083 (1991) (finding that "[a]dvertising alternatives" to television and cable advertising "include radio, newspapers, magazines, direct mail, yellow pages, and outdoor advertising").

[51] *See also First Report and Order* in MM Docket No. 87-7, 4 FCC Rcd 1723, 1727 (1989) (in decision relaxing radio duopoly rule, FCC observed that the "record in this proceeding indicates that other media," including "television stations, newspapers, and cable television systems," provide "competition for advertising with radio").

A study previously conducted for NAB similarly found that radio stations, in selling their advertising time slots, "compete[] in a product market that includes other radio stations and a host of other media," including broadcast and cable television, newspapers, magazines, outdoor advertising and direct mail.[52] While each advertising medium has different characteristics, more than one type of media can generally fulfill an advertiser's needs. As a result, advertisers strive to find the most cost effective "media mix," and "regularly shift components of their [advertising] budgets between media as tactics and cost factors dictate." *Kerr Study* at 15-16.[53] Although certain advertisers may feel that a particular medium or media may be better suited than other media for their individualized advertising needs, it is contrary to common sense to contend that advertisers are captive to any single medium, or that advertisers are forced to maintain their advertising with a particular medium "in the face of rate increases out of proportion to other media." *Kerr Study* at 19-20 (asserting that advertising messages "can be distributed by myriad . . . media options," and "[e]ven the discrete audience targeting offered by specific radio formats now can be obtained through other media alternatives," including cable television and direct mail).[54]

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[52] William Kerr, Ph.D., Capital Economics, *Comments of the National Association of Broadcasters on the Advertising Product Market* at 5 (submitted to Department of Justice, Antitrust Division, May 15, 1996) ("*Kerr Study*"). This study discussed in detail how the radio industry works to persuade advertisers to divert their advertising dollars away from newspapers, broadcast television, cable television and other media. *Id.* at 6-13.

[53] The *Kerr Study* (at 16-18) cited many instances of advertisers who traditionally heavily relied upon one advertising medium shifting their advertising budgets between media because of perceived changes in the value received for their advertising dollar.

[54] *Accord* B.J. Seldon, R.T. Jewell, and D.M. O'Brien, *Media Substitution and Economies of Scale in Advertising*, 18 Int'l. J. Ind. Org. 1153, 1173 (1999) ("with respect to mergers in the television and radio media, antitrust agencies perhaps need not be too concerned that the owners of these media outlets will be able to significantly increase the price of advertising because advertisers could switch to print advertising"); B.J. Seldon and C. Jung, *Derived Demand for Advertising Messages and Substitutability Among the Media*, 33 Q. Rev. Econ. & Fin. 71, 82

Several recent empirical studies have, moreover, concluded that the various media are substitutable for advertising purposes. Studies submitted in the pending proceeding on local radio ownership specifically concluded that radio advertising is not a separate market because television and newspapers (at the least) compete with radio for advertising dollars and because television and newspaper advertising are significant substitutes for radio advertising.[55] Another study similarly found that, at the local level, television advertising is not a distinct antitrust market because "radio and newspaper advertising are substitutes for TV advertising."[56]

(1993) ("if advertising in one media were controlled by only a few firms and if these firms attempted to exercise market power, producers could advertise through other, less costly, media").

[55] *See* Statement of Professor Jerry A. Hausman at 10-11, attached as Appendix C to Comments of Viacom Inc. in MM Docket Nos. 01-317 and 00-244 (filed March 27, 2002) ("*Hausman Study I*") (concluding that the study refutes "claim that radio is a separate market" because the results show that radio, television and newspaper advertising "are significant substitutes for each other"); Statement of Professor Jerry A. Hausman at 2-3, attached as Exhibit Six to Comments of Clear Channel Communications, Inc. in MM Docket Nos. 01-317 and 00-244 (filed March 27, 2002) ("*Hausman Study II*") (relevant antitrust product market should include at least radio, television and newspaper advertising, as empirical results demonstrate that "the prices of TV advertising and newspaper advertising vary with the price of radio advertising, and that TV and newspaper advertising are substitutes for radio advertising").

[56] R.B. Ekelund, Jr., G.S. Ford and J.D. Jackson, *Are Local TV Markets Separate Markets?*, 7 Int'l. J. Econ. Bus. 79, 91-92 (2000) (arguing that "broadening the local advertising market to include (at least, some) other local media is required to accurately delineate the appropriate antitrust market for local advertising"). *Accord* Seldon, *et al.*, *Media Substitution* at 1175 (finding at the national level "strong substitution possibilities from TV into both print and radio, from radio into both print and TV, and from print into radio"); Seldon & Jung, *Derived Demand* at 82 (finding "fairly good" substitutability among the various media, aggregating the advertising market as a whole). Other studies have, however, found weaker substitutability between media. *See* R.B. Ekelund, Jr., G.S. Ford and J.D. Jackson, *Is Radio Advertising a Distinct Local Market? An Empirical Analysis*, 14 Rev. Ind. Org. 239, 254-55 (1999) (while "television and newspaper advertising are substitutes for radio advertising," study concluded that "substitutability" within local radio markets was "present," but "low"); A.J. Silk, L.R. Klein and E.R. Berndt, *Intermedia Substitutability and Market Demand by National Advertisers*, 20 Rev. Ind. Org. 323 (2002) (national advertising on different media are weak substitutes for each other).

The Commission's own study on this question suggested only weak substitutability between newspapers, radio and broadcast television for local business advertisers.[57] This study is, however, fundamentally flawed. As an initial matter, it failed to consider cable television advertising at all, even though the Commission itself had previously found that local cable was "directly competitive" with radio advertising, *1992 Radio Ownership Order*, 7 FCC Rcd at 2759, and only recently concluded that "cable advertising is becoming a closer substitute for broadcast [television] advertising." *OPP Video Study* at 23. As the Commission specifically explained, "cable systems are becoming stronger competitors in the local advertising market" because "cable system clustering and the increasing sophistication of cable interconnects make local cable a more efficient advertising buy." *Id*. at 134-35.[58]

Even more seriously, the FCC's study utilized inappropriate and insufficient price and revenue data and reached broad conclusions that are not supportable. For example, rather than utilizing newspaper advertising data from local markets, this study allocated a national total for newspaper advertising revenue across the DMAs being examined depending upon the relative population of each DMA.[59] But merely apportioning *national* newspaper advertising data does not in any way provide relevant information about the *local* markets purportedly being

[57] C. Anthony Bush, *On the Substitutability of Local Newspaper, Radio, and Television Advertising in Local Business Sales* (Sept. 2002) ("*FCC Substitutability Study*").

[58] Trade publications have similarly described how higher cable ratings and consolidation will lead to "a bigger share of local ad revenue" for cable operators. Kathy Haley, *On the Rise*, Broadcasting & Cable at 1A (Nov. 25, 2002).

[59] The author of this study chose to use television markets (DMAs) as the relevant geographic area to evaluate the substitutability between various media in local markets. The study examined 45 randomly selected DMAs, but did not explain why DMAs were the most appropriate geographic market for evaluating advertising substitutability. Indeed, none of the Commission's studies directly addressed the question of defining the relevant geographic market for advertising, perhaps revealing the serious challenges involved.

examined.[60] Use of this "averaged" national newspaper revenue data – rather than market-specific newspaper data – undermines any claim that the FCC's study accurately "examines the substitutability of *local* newspaper, radio, and television advertising in the sales activities of *local* businesses." *FCC Substitutability Study* at 13 (emphasis added).

Beyond these serious problems with the newspaper data utilized, the study also used questionable radio and television price and revenue data. The study utilized "SQAD" data (Service Quality Analytics Data) as "the source of both *local* radio and television prices." *Id*. at 10 (emphasis added). However, SQAD data is derived from reports of the advertising prices paid in various markets by *national and regional* advertisers, not local advertisers. And as the Commission specifically recognized in one of its other studies utilizing SQAD data, the "rates paid by local advertisers likely differ from the rates paid by national and regional advertisers."[61] Thus again, the data utilized in this study undermines any claim that it accurately reflects media advertising in *local* markets.[62]

The study has additional serious shortcomings with regard to its radio data. Specifically, the study "assume[d] that local radio revenues of Arbitron Markets within a DMA are total local

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[60] For instance, the study failed to account for the absolute and relative circulation of the various newspapers in the markets being examined. The study also failed to account for markets in which there was more than one newspaper. Both of these variables affect the level of revenues for newspapers in different markets, and the author of this study could have obtained this information.

[61] Keith Brown and George Williams, *Consolidation and Advertising Prices in Local Radio Markets* at 7 (Sept. 2002).

[62] In addition, the study's use of advertising rates for late news (for television) and for evening (for radio) appears questionable. These two time periods are not comparable, and the advertising prices for these periods may not be reflective of the actual level of competition between television and radio in local advertising markets. The more popular time period for the two media – early news for television and morning drive time for radio – would seem to be more appropriate.

radio revenues for the DMA." *FCC Substitutability Study* at 10. This assumption results in a significant understatement of the level of radio revenues because of the large number of counties and radio stations that are not located in any Arbitron market.[63] For instance, there are 16 counties in the Boston, Massachusetts DMA, but there are only 11 counties in the Arbitron radio markets that are physically within the Boston DMA. In those 11 counties that are in Arbitron metro markets located within the Boston DMA there are 114 radio stations and approximately 5,911,200 people. However, within the entire Boston DMA (including the areas not located in an Arbitron metro market), there are 135 radio stations and 6,111,600 people. Thus, the radio data utilized in the study failed to reflect 21 radio stations in the Boston DMA, and undercounted the number of potential radio listeners in the DMA by 3.4%. And the radio station and population undercounts in other DMAs are much more dramatic. In the Little Rock, Arkansas DMA, for example, 79 radio stations are "missed" and the number of potential radio listeners is underestimated by an astounding 130.7%.[64] Due to the study's large and widely varying understatement of both the number of radio stations and of potential radio listeners in the DMAs being examined, the study necessarily understated the revenue totals for the radio stations in these markets, and consequently failed to measure accurately the level of competition provided by radio to other media in local markets.

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[63] Each county in the U.S. is assigned to a specific DMA, and every television station in the U.S. is located in a specific DMA. In contrast, Arbitron does not include every county in the U.S. in a radio market. As a result, approximately 42 percent of all radio stations in the U.S. are not located in Arbitron markets.

[64] *See* Attachment B, Table 1 (Comparison of Radio Markets with Selected TV Markets) and Table 2 (Comparison of the Number of Radio Stations in Arbitron Metros and Nielsen DMAs). Other markets also exhibit remarkably high levels of uncounted radio stations and listeners. In fact, the study's methodology resulted in an undercount of the potential radio listening population by over 100%, and of the number of radio stations by the dozens, in ten of the 45 DMAs examined. *See id.*

In sum, this study's conclusion as to the low levels of substitutability between television, radio and newspaper advertising in local media markets cannot be relied upon as the basis for any Commission decision. Without appropriate revenue and price data, no valid conclusions can be drawn as to the relationships between different media in local advertising markets, especially as to how changes in advertising rates in one medium affects advertising on other media. Because the Commission's study inappropriately utilized "averaged" national newspaper revenue data, obviously incomplete radio revenue data, and data reflecting the television and radio advertising prices paid by national and regional (rather than local) advertisers, its conclusions should be disregarded.

Particularly in light of significant evidence showing inter-media competition in advertising and the serious shortcomings of the Commission's study showing only weak substitutability between advertising media, NAB sees no sufficient reason for the Commission to reject at this juncture its earlier determinations about the broad nature of the local advertising market.[65] At the very least, if the Commission now abandons its earlier position that "intense" competition for "audiences and advertising revenues" exists between various broadcast and other media outlets, *1992 Radio Ownership Order*, 7 FCC Rcd at 2757-58, then it must supply a

[65] The Department of Justice has in recent years taken the position that radio advertising does constitute a separate market. But the Justice Department itself has not been consistent in this position, and in fact previously asserted that radio and television stations and newspapers are competitors in the advertising market. *See Second Report and Order* in Docket No. 18110, 50 FCC 2d 1046, 1056 (1975) (Department of Justice "sees newspapers and television advertising as interchangeable" and "would define the product market so as to include newspapers and television stations"); *First Report and Order* in Docket No. 18110, 22 FCC 2d 306, 313 (1970) (Department of Justice "points out that AM, FM, and TV are for many purposes sufficiently interchangeable to be directly competitive"). The Supreme Court has, furthermore, expressly recognized that broadcast stations compete with other media in the advertising market. *See Lorain Journal Co. v. U.S.*, 342 U.S. 143, 154 (1951) (finding that a radio station and a newspaper in the same geographic area competed in the "dissemination of news and advertising").

detailed and "reasoned analysis" to justify its change in course.[66] Certainly any attempt to justify retention of the local broadcast ownership rules based solely or primarily on potential harm to advertisers in an unduly narrowly defined local advertising market would be vulnerable to challenge, given the Commission's earlier consistent use of a broad advertising market and the existence of evidence showing that the various media are substitutable for advertising purposes.[67]

C. The Public's Interest in Diversity – However Defined – Is Clearly Being Met on a Market Basis.

Beyond competition concerns, the Commission has traditionally justified its structural ownership rules "on considerations . . . loosely call[ed] diversity."[68] NAB observes, however, that the Commission has long had difficulty in clearly articulating its interests in the "elusive concept" of diversity, which, according to Chairman Powell, "has come to mean many things."[69] Indeed, in this proceeding, the Commission has identified, defined and attempted to prioritize among four aspects of diversity (viewpoint, outlet, source and program). *See Notice* at ¶¶ 34-41.

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[66] *See, e.g., Motor Vehicle Manufacturers Association of the U.S., Inc. v. State Farm Mutual Automobile Ins. Co*., 463 U.S. 29, 42 (1983) (an agency changing course "is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance"); *ACT v. FCC*, 821 F.2d 741, 746 (D.C. Cir. 1987) (court found that FCC had failed to explain adequately its alteration of "long-established" children's television policy); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) ("an agency changing its course must apply a reasoned analysis indicating that prior policies and standards are being deliberately changed").

[67] *See Sinclair*, 284 F.3d 148 (finding the FCC's television duopoly "eight voices" test, which very narrowly defined a media "voice" as including only broadcast television stations, to be arbitrary and capricious).

[68] Separate Statement of Commissioner Michael Powell, *Notice of Inquiry, 1998 Biennial Regulatory Review*, 13 FCC Rcd 11276 (1998).

[69] *Powell Biennial Review Statement*, 15 FCC Rcd at 11146. *See also* Separate Statement of Commissioner Michael Powell, *Notice of Inquiry, 1998 Biennial Regulatory Review*, 13 FCC Rcd 11276 (1998) (diversity is a "visceral matter," one "bathed in subjective judgments and debated in amorphous terms").

NAB submits that an effort to establish an explicit priority between the various, interrelated aspects of diversity may be unnecessary. As discussed in detail in Section II., recent decades have seen a proliferation of media outlets so that even small local markets are now served by a wide array of outlets controlled by a number of separate owners. *See, e.g., FCC Media Outlet Study* (even under a conservative count of media outlets in ten markets, Commission found that the increase in number of outlets averaged almost 200 percent from 1960-2000, and the increase in the number of owners averaged 140 percent). And since surveys of media outlets in local markets have consistently and significantly underestimated the number of outlets accessible by consumers (*see supra BIA Out-of-Market Voices Study*), the level of diversity available to consumers on a market basis has clearly reached unprecedented heights. In such a marketplace, attempting to determine whether one or more aspects of diversity should have priority over yet another aspect seems almost an academic exercise and should not preoccupy the Commission in this proceeding. As discussed in detail below, the public's interest in diversity – however defined and prioritized – is clearly being met by a wide array of outlets that consumers find increasingly substitutable for a variety of uses. Moreover, concerns about the effect of recent ownership consolidation within sectors of the broadcast industry on diversity – whether programming, viewpoint or source – are unwarranted.

1. The Diversity, as well as the Economic, Benefits of Consolidation Have Long Been Recognized by the Commission and Other Commentators.

As NAB explained in earlier proceedings,[70] the Commission in past decades regarded the "proper objective" of the ownership rules to be "the maximum diversity of ownership that

[70] *See* Comments of NAB in MM Docket Nos. 01-235 and 96-197 at 18-20 (filed Dec. 3, 2001).

technology permits in each area."[71] Under this approach, "60 different licensees" in a market were regarded as "more desirable than 50," and even 51 were thought to be "more desirable than 50," because "there is no optimum degree of diversification." *First R&O*, 22 FCC 2d at 311-12. Some observers recognized the flaws in this "maximization at all costs" philosophy at the time. As FCC Commissioner Robert Wells stated, "if the result of having 60" rather than 50 different licensees, "is a deterioration in the service of 20 outlets, we have hardly accomplished our goal." Dissenting Statement to *First R&O*, 22 FCC 2d at 337. Since the 1970s, moreover, it has become clear that the Commission's "'more is better' and 'diversity at any cost' policies, like most panaceas, worked much better in theory than in practice."[72] Perhaps in recognition of the flaws with its regulatory approach, the Commission itself in 1989 made clear that it no longer believed that maximizing diversity of ownership was its primary objective. *See Second Report and Order* in MM Docket No. 87-7, 4 FCC Rcd 1741, 1742 (1989) (in relaxing the one-to-a-market prohibition, the Commission stated that "economic competition and diversity of programming and viewpoints are not the only goals, and diversity of ownership is not the only consideration, in the licensing of broadcast stations in the public interest").[73]

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[71] *First Report and Order* in Docket No. 18110, 22 FCC 2d 306, 311 (1970) ("*First R&O*") (adopting the radio/television cross-ownership, or one-to-a-market, rule preventing any single entity from owning more than one broadcast facility in the same market).

[72] David M. Hunsaker, *Duopoly Wars: Analysis and Case Studies of the FCC's Radio Contour Overlap Rules*, 2 CommLaw Conspectus 21, 22 (1994) (blaming the FCC's policies for the radio industry's serious economic trouble of the early 1990s).

[73] In the 1996 Act, Congress similarly demonstrated that it did not believe diversity of ownership should be the primary consideration governing broadcast ownership regulation. *See* H.R. Rep. No. 204, 104th Cong., 2d Sess. 55 (1996) (noting need "to depart from the traditional notions of broadcast regulation" and to eliminate "arbitrary limitations on broadcast ownership," which "are no longer necessary" in a competitive video market).

Indeed, in numerous ownership proceedings during the past decade, the Commission has expressly recognized the public interest benefits flowing from joint ownership of media entities in local markets. In rulemakings liberalizing the local radio and the radio/television cross-ownership rules, for example, the Commission determined that "combinatorial efficiencies derived from common ownership" of broadcast outlets "in local markets were presumptively beneficial and would strengthen the competitive standing of combined stations," which "would enhance the *quality of viewpoint diversity* by enabling such stations to invest additional resources in programming and other service benefits provided to the public."[74] Previous Commission decisions to loosen local ownership restrictions have relied on studies explicitly showing that "group-owned stations spend a larger percentage of their budgets on news and overall programming than independent stations" and that group-owned stations may "air more informational programming than non-group-owned stations." *Second Report and Order*, 4 FCC Rcd at 1748. A recent study has, moreover, confirmed that ownership consolidation in the broadcast industry can achieve operating efficiencies without producing any significant increase in broadcasters' market power. This empirical study of profits and concentration in the radio industry specifically found that "radio station groups achieve efficiencies relative to stand-alone stations" and that "[t]hese efficiencies are achieved through group ownership without a corresponding increase in market power" of radio broadcasters generally.[75]

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[74] *In re Golden West Broadcasters, Memorandum Opinion and Order*, 10 FCC Rcd 2081, 2084 (1995) (emphasis added). *See also Local TV Ownership Order*, 14 FCC Rcd at 12930 (allowing local television duopolies "can contribute to programming and other benefits such as increased news and public affairs programming and improved entertainment programming, and, in some cases, can ensure the continued survival of a struggling station").

[75] R.B. Ekelund, Jr., G.S. Ford and T. Koutsky, *Market Power in Radio Markets: An Empirical Analysis of Local and National Concentration*, 43 J. Law & Econ. 157, 181 (2000).

In sum, previous studies and FCC decisions have established that "programming and other" public interest benefits flow from the "efficiencies derived from common ownership of radio and television stations in local broadcast markets." *Golden West*, 10 FCC Rcd at 2084. Thus, the retention of strict broadcast-only local ownership rules will adversely impact both the "competitive standing" of broadcast outlets (especially in relation to their multichannel competitors) and the "quality of viewpoint diversity" in local markets. *Id*.

2. Today's Local Media Markets Clearly Offer Diverse Programming to Consumers.

As described in Section III.A., the proliferation of broadcast outlets and the rise of competing multichannel video and audio programming distributors have produced an exponential increase in programming and service choices available to viewers and listeners. In such an environment, NAB reemphasizes that it is not necessary for every broadcast station to air a wide variety of programming, so long as different types of programming are available to consumers on a market basis.[76] In considering whether the public's interest in receiving a diversity of programming and services is being met, the Commission therefore need not be concerned that every broadcast station be "all things to all people," but should focus on the variety of programming offered across markets as a whole.[77]

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[76] *See, e.g., Deregulation of Radio, Report and Order* in BC Docket No. 79-219, 84 FCC 2d 968, 977-79 (1981), *recon. granted in part and denied in part*, 87 FCC 2d 797 (1981), *aff'd in part and remanded in part, Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413 (1983) (due to the growth of radio and other informational and entertainment services, it is no longer necessary for the government to require "every radio station to broadcast a wide variety of different types of programming" because a "full complement of programming services" will be available through "the totality of stations" in a market); *Television Deregulation Order*, 98 FCC 2d at 1088 (requiring television stations to "present programming in all categories" is "unnecessary and burdensome in light of overall market performance").

[77] *See, e.g., Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 355-56 (D.C. Cir. 1998) (it is "understandable why the Commission would seek station to station differences," but a "goal of making a single station all things to all people makes no sense" and "clashes with the reality of

Moreover, as economists have predicted for decades, the recent consolidation within local broadcast markets (especially among radio stations) has only enhanced diversity of programming.[78] Numerous studies have now shown that the post-1996 ownership consolidation in the radio industry has indeed significantly enhanced programming diversity in local radio markets. *See Notice* at ¶ 43 (asking about the effect of consolidation on diversity in local markets). For example, an NAB study conducted in 1999 found an increase, between 1996 and 1998, in the average number of programming formats offered in all Arbitron surveyed markets.[79] An independent study, also conducted in 1999, similarly concluded that, "[b]etween 1993 and 1997 ownership concentration and the programming variety available in local radio markets both increased substantially," consequently "suggest[ing] that the increased concentration has been

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the radio market"); *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413, 1434 (D.C. Cir. 1983) (audiences "benefit by the increased diversity of programs" offered by the growing number of outlets "across the market"); Benjamin J. Bates and Todd Chambers, *The Economic Basis for Radio Deregulation*, 12 J. Media Econ. 19, 28 (1999) (observing the "expansion of the number of all-news/all-talk format stations," and noting that such expansion "tend[ed] to support the arguments of deregulation that the public's interest in news and public-affairs programming is being served, if not by every station, at least by stations in many markets").

[78] *See, e.g.*, Peter Steiner, *Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting*, 66 Q.J. Econ. 194 (1952) (demonstrating that a consolidated owner of radio stations within a market may be more likely to program minority taste formats than if stations in the market were separately owned). *See also 1992 Radio Ownership Order*, 7 FCC Rcd at 2757 (Commission itself envisioned that consolidated ownership would promote "program service diversity and the development of new broadcast services" when it initially liberalized radio ownership rules in 1992).

[79] See Comments of NAB in MM Docket No. 99-25, Attachment B, *Format Availability After Consolidation* (filed Aug. 2, 1999).

good for listeners."[80] This study also found that "increased concentration *caused* an increase in available programming variety." Berry and Waldfogel, *Mergers* at 25 (emphasis added).

Two more recent studies conducted in 2002 for the FCC's pending proceeding on local radio ownership confirm the results of these earlier studies. One study examining 240 Arbitron markets in 1993, 1997 and 2001 found "a positive and significant relationship between consolidation and format variety." *Hausman Study I* at 13. Another study conducted by BIA Financial Network clearly demonstrated that the number of programming formats provided in Arbitron radio markets has continued to increase and that a causal link existed between increased ownership consolidation and increased programming diversity. Specifically, this study found that, whether utilizing general or more specific format categories, the average number of programming formats offered in all Arbitron surveyed markets has continued to increase since 1998.[81] After conducting several regression analyses to establish more clearly the connection between ownership consolidation and these continuing increases in radio programming diversity, the *BIA Diversity Study* concluded that "there is a statistically significant positive relationship between the level of local ownership concentration and the level of local format diversity." *Id*. at 17.[82]

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[80] Steven Berry and Joel Waldfogel, *Mergers, Station Entry, and Programming Variety in Radio Broadcasting*, National Bureau of Economic Research, Working Paper 7080 at 25-26 (April 1999).

[81] BIA Financial Network, *Has Format Diversity Continued to Increase?* at 5-7 (March 2002), Attachment A to NAB Comments in MM Docket Nos. 01-317 and 00-244 (filed March 27, 2002) ("*BIA Diversity Study*").

[82] *See also* Katz Media Group, *Spring 2002 National Format Averages and Share Trends* (Nov. 8, 2002) (concluding that "ownership consolidation has contributed to radio's ability to satisfy the listeners' desire for new formats and programming approaches" and that "new, more targeted formats," including formats appealing to minority groups, "have appeared" as the result of consolidation) ("*Katz Media Spring 2002 Study*"); George Williams, Keith Brown and Peter Alexander, *Radio Market Structure and Music Diversity* at 17-18 (Sept. 2002) ("*FCC Music*

Multiple studies conducted by different parties have thus shown that consumers today have access to more diverse radio programming than ever before, and that ownership consolidation has contributed significantly to the increase in programming diversity since 1996. Although the FCC's recent radio industry review indicated that the number of available programming formats had recently declined slightly in some of the largest markets while increasing in most of the smaller ones, this conclusion, as the Commission itself explained, is "not necessarily in conflict" with the number of empirical studies showing that radio industry consolidation has produced greater diversity of formats in markets of all sizes. *FCC Radio Trends Report* at 7-8 and n.12. As the FCC recognized, diversity is increased by stations adopting new and different "subformats," which "our relatively aggregated measure of format does not capture." *Id*. Previous studies have in fact shown greater increases in format diversity when utilizing format categories more specific than the general format categories used by the Commission in its recent report.[83] Clearly, the Commission should have utilized more specific format categories in its report in order to obtain a more accurate view of the growth in radio programming diversity, especially in larger markets.[84] Another study by the Commission in fact

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Diversity Study") (in a study comparing music diversity on radio in 1996 and in 2001, FCC found that "playlists for same format stations competing in the same local market diverged" during this period, "so that listeners in local radio markets may have experienced increasing song diversity").

[83] *See, e.g., BIA Diversity Study* at 6-7 (finding an 11.1% increase in the average number of specific formats being provided in Arbitron markets from 1998 to 2001, and finding that the number of specific formats available to listeners had increased in markets of all sizes, including the largest).

[84] Utilizing general format categories to discern changes in format diversity is particularly inadequate for larger radio markets. The dozens of stations within large urban markets provide those markets with essentially all of the available general programming formats, so any increase in format variety can only be measured by utilizing more specific format categories. This may explain why the Commission's report found no recent increases in format diversity in the largest

recognized that stations with similar general formats, but different specific formats, do in fact air different programming. *See FCC Music Diversity Study* at 12-13 (comparing songlists between radio stations with similar general formats, but different specific formats, such as Adult Contemporary and Hot Adult Contemporary, and finding that playlist diversity had generally increased on these stations).

In sum, available empirical evidence focusing on the radio industry indicates that ownership consolidation does not have a deleterious effect on programming diversity in local media markets, but actually enhances local diversity of programming. Commentators focusing on other media sectors have similarly asserted that local ownership consolidation may actually foster the Commission's diversity goals.[85]

3. Concerns about the Effect of Broadcast Industry Consolidation on Other Aspects of Diversity Also Are Unwarranted.

As discussed above, today's competitive media markets offer a vast array of programming and services to consumers, and available evidence indicates that consolidation within local media markets only promotes further programming diversity. In addressing other aspects of diversity, the *Notice* (at ¶ 41) emphasized that viewpoint diversity has traditionally "been a central policy objective" of the ownership rules, and inquired "whether viewpoint diversity should continue to be a primary goal." Despite this traditional concern with viewpoint diversity, the Commission cannot, however, simply ignore the fact that much of the content on television and radio is entertainment-oriented and not the type of programming where the

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markets when other studies utilizing more specific format categories have shown significant increases in diversity in those markets. *See BIA Diversity Study* at 6.

[85] *See, e.g.*, Haddock and Polsby, *Bright Lines* at 333 (arguing that television duopoly rule preventing local consolidation "may actually frustrate" FCC's diversity and competition goals); Pritchard, *Longitudinal Study of Local Media Outlets* at 22 (finding that the rate of increase in the number of media outlets available in five local communities rose after passage of 1996 Act).

concept of viewpoint antagonism has substantial "relevance." *Powell Biennial Review Statement*, 15 FCC Rcd at 11149. *Programming* diversity clearly remains the aspect of diversity most relevant in the context of entertainment programming, and this type of diversity is only enhanced by consolidation in local media markets. With regard to the types of programming where the concept of viewpoint antagonism is more relevant, concerns that local ownership consolidation has significantly impacted viewpoint diversity appear misplaced.

As an initial matter, the existing literature indicates that the connection between ownership and viewpoint or content diversity specifically remains unproven. For example, one researcher, after reviewing the history of FCC ownership regulation and the related scholarly literature, simply concluded that "[t]here is no evidence" that the Commission's ownership policies have "in fact resulted in greater (or less) diversity of content" within the commercial sectors of the U.S. broadcasting industry.[86] Another study focusing on the television duopoly rule, after reviewing the existing economic literature on the effect of local market structure on diversity, found that "[m]ultiplicity of ownership is a blunt instrument, and . . . possibly a counterproductive one" for ensuring that "many points of view are heard." Haddock and Polsby, *Bright Lines* at 348-49 (also expressing doubt as to whether "diversity of ownership" had any "appreciable relationship to citizens' awareness of important public affairs"). Chairman Powell himself has agreed with these assessments, stating that he failed "to see how ownership restrictions in themselves do much to promote the goal" of providing antagonistic viewpoints. While the "ownership class may include different people," it is, according to the Chairman,

[86] Benjamin Compaine, *The Impact of Ownership on Content: Does It Matter?*, 13 Cardozo Arts & Ent. L.J. 755, 763 (1995).

"hard to see how that ensures" they "are different in their viewpoints." *Powell Biennial Review Statement*, 15 FCC Rcd at 11149.

Because the actual correlation between ownership of broadcast stations and the local availability of diverse ideas and viewpoints remains unclear, the Commission in this proceeding cannot simply assume that increased ownership consolidation in local broadcast markets has already, or will in the future, result in a decline in viewpoint diversity. To the contrary, both older and quite recent studies indicate that consolidated media owners do in fact provide a meaningful diversity of viewpoints on issues of public concern, thereby calling into question the FCC's traditional presumption that multiple owners necessarily "provide greater viewpoint diversity." *Notice* at ¶ 44.

For example, one study compared the content of six newspapers in contrasting ownership situations to determine "whether significant differences in content would be found" in "joint ownership" arrangements.[87] The authors hypothesized that "in cities where the same publisher owned both the morning and afternoon papers, there would be a significant overlap or duplication in content (for both news and editorial content) -- more so than in the city having different owners." Hicks and Featherston, *Duplication of Newspaper Content* at 551. To their surprise, however, they found "absolutely *no* duplication in opinion content in any of the three cities," as "[e]ach of the six newspapers published separate editorials, political columns and editorial cartoons" and "no duplication of letters to the editor occurred." *Id*. (emphasis added). This study also noted that, "[i]n all three cities studied, readers of the two papers published get

[87] Ronald Hicks and James Featherston, *Duplication of Newspaper Content in Contrasting Ownership Situations*, 55 Journalism Q. 549, 550 (1978). This study examined (i) a morning and an afternoon newspaper commonly owned by a small local chain in Baton Rouge, Louisiana; (ii) a morning and an afternoon newspaper commonly owned by a large national chain in New Orleans, Louisiana; and (iii) separately owned morning and afternoon newspapers in Shreveport, Louisiana.

two distinct products in terms of appearance and non-duplicated content," and that the "type of ownership would seem to make little difference." *Id*. at 553. Thus, the authors concluded that it was possible "to have real competition in a local, jointly owned situation." *Id*.

Two very recent studies specifically examining the diversity of information and viewpoints expressed by commonly owned newspaper/broadcast combinations regarding the 2000 Presidential campaign similarly concluded that commonly owned outlets do not speak with a single voice about important political matters. The first, more narrow study "found substantial diversity in the news and commentary offered by each of the three newspaper/broadcast combinations" under consideration, and saw "no evidence of ownership influence on, or control of, news coverage" of the Presidential campaign by the cross-owned media properties in the three markets.[88] Specifically, the "slant" of the campaign coverage aired by each company's radio and television stations "tended to differ from the slant of news published by the company's newspaper." Pritchard, *A Tale of Three Cities* at 49.

A broader study by the same author that examined coverage of the 2000 Presidential campaign by cross-owned newspaper/television combinations in ten different cities concluded that common ownership of a newspaper and a television station in a community did "not result in a predictable pattern of news coverage and commentary on important political events between the commonly-owned outlets."[89] More specifically, this study found that in five of the ten newspaper/television combinations examined, "the overall slant of the coverage broadcast by a

[88] David Pritchard, *A Tale of Three Cities: "Diverse and Antagonistic" Information in Situations of Local Newspaper/Broadcast Cross-Ownership*, 54 Fed. Comm. L.J. 31 (2001).

[89] David Pritchard, *Viewpoint Diversity in Cross-Owned Newspapers and Television Stations: A Study of News Coverage of the 2000 Presidential Campaign* (Sept. 2002) ("*Viewpoint Diversity Study*").

company's television station was noticeably different from the overall slant of the coverage provided by the same company's newspaper, and often contradicted the newspaper's endorsement of a candidate." In the other five combinations studied, "the overall slant of newspaper coverage of the 2000 campaign was not significantly different from the overall slant of the local television coverage." *Viewpoint Diversity Study*, Results Section. The author emphasized that the data did not support any conclusions as to why the overall slants in those five cases were similar – in other words, the data cast no light on whether it was common ownership or other factors that resulted in a similar slant on campaign coverage in half of the newspaper/television combinations. In sum, this FCC-commissioned study concluded that "cross-owned newspapers and broadcast stations covered the campaign in the way that mainstream American news organizations typically cover political campaigns." *Id*., Discussion Section.

Because "diversity of ownership *per se* is not an end in itself," but merely "a means to achieve the public interest goal of promoting" viewpoint diversity (*Second Report and Order*, 4 FCC Rcd at 1743), it is incumbent upon the Commission to establish a link between its local ownership rules and the local availability of diverse ideas and viewpoints. Indeed, both existing case law and Section 202(h) clearly place the burden on the Commission, which now has decades of experience with the local ownership rules, to demonstrate empirically this connection between these rules and viewpoint diversity.[90] The Commission plainly cannot, at this juncture,

[90] *See, e.g., Bechtel II*, 10 F.3d at 880 (court invalidated FCC criterion for licensing broadcast applicants because, after "years of experience with the policy," the Commission had "no evidence to indicate that it achieves even one of the benefits that the Commission attributes to it"); *Lamprecht v. FCC*, 958 F.2d 382 (D.C. Cir. 1992) (gender-based preference in broadcast comparative licensing process was invalidated when FCC introduced no evidence supporting a link between female ownership and programming of any particular kind).

continue to rely on assumptions or "unverified predictions" about diversity to justify retention of the local broadcast ownership rules in their current form. *Bechtel II*, 10 F.3d at 880.

NAB doubts, however, that the Commission will be able to demonstrate the requisite empirical link between its local ownership restrictions and viewpoint diversity because the currently available evidence, as described above, indicates that ownership consolidation does *not* significantly inhibit the expression of diverse viewpoints by commonly owned outlets in local markets. Simply put, "the joint ownership of two or more media outlets in the same market does not necessarily lead to a commonality of viewpoints by those outlets." *Second Report and Order*, 4 FCC Rcd at 1744.[91] The ability of consumers to access a diverse range of media outlets to obtain differing programming and viewpoints is, moreover, significantly enhanced by the growing level of substitutability between media for both entertainment and informational purposes.

4. Increasing Substitutability among Media Outlets Should Further Allay Diversity-Related Concerns.

Given the Commission's evident concerns about "the impact of concentration on diversity in the marketplace of ideas," NAB cautions that it must be careful in defining the market so as not to "overestimate the degree of concentration."[92] In an "era of rapidly

[91] And NAB again stresses that the degree of ownership consolidation that has occurred in local markets should not be overstated. The FCC's own study of media outlets has shown a considerable *increase* in the number of separate owners in local markets over the past 40 years. NAB's study focusing on radio ownership illustrated the large number of commercial radio stations that either remain "standalones," or are part of local duopolies, in their respective markets. *See supra* Section II.

[92] Benjamin J. Bates, *Concentration in Local Television Markets*, J. Media Econ. 3, 17 (Fall 1993) (arguing that using the "same market definition to consider the impact" of "concentration on the price of advertising" to also consider "the impact of concentration on diversity in the marketplace of ideas" would "be to seriously overestimate the degree of concentration" in the marketplace of ideas).

converging media technologies, and the equally rapid development and diffusion of alternatives to mainstream media," it is "increasingly important to consider the presence and impact of substitutes" to traditional media such as broadcast outlets. Bates, *Concentration in Local Television Markets* at 17. Indeed, nearly two decades ago, the Commission concluded that "the information market relevant to diversity concerns includes not only TV and radio outlets, but cable, other video media, and numerous print media" (such as newspapers, magazines and periodicals) "as well." *Report and Order* in Gen. Docket No. 83-1009, 100 FCC 2d 17, 25 (1984) (specifically finding that "these other media compete with broadcast outlets for the time that citizens devote to acquiring the information they desire" and "are substitutes in the provision of such information"). Today, with the recent emergence of, *inter alia*, the Internet and video and radio satellite services, the "information market relevant to diversity concerns" is broader and more varied than ever before. *Id*.

Given the FCC's previous conclusion that cable, other video, and various print media all compete for consumer attention and all "are substitutes in the provision" of information, *id*., no sufficient reason exists to conclude in this proceeding that broadcasting today has "unique attributes" that should lead the Commission "to define and measure diversity without reference to other media." *Notice* at ¶ 42. Studies recently conducted for the FCC certainly do not support the view that consumers are solely or uniquely dependent on broadcast outlets for either entertainment or for information. Instead, these studies reveal considerable substitutability between these media for various uses.

For example, one study examining the extent to which consumers regard different types of media as substitutable for both news and entertainment purposes found clear evidence of substitution between the Internet and broadcast television, both overall and for news specifically;

between daily and weekly newspapers; and between daily newspapers and broadcast television news. Some evidence of substitutability was also found between cable and daily newspapers, both overall and for news consumption; between radio and broadcast television for news consumption; and between the Internet and daily newspapers for news consumption. Joel Waldfogel, *Consumer Substitution Among Media* at 3, 39 (Sept. 2002).

A survey conducted for the Commission by Nielsen Media Research similarly showed that consumers use a variety of sources to obtain news and information and these sources are, at least to a considerable extent, substitutable. Nielsen Media Research, *Consumer Survey on Media Usage* (Sept. 2002) ("*Nielsen Consumer Survey*"). First of all, this study demonstrated that consumers use a variety of media – including television, newspapers, radio, the Internet and magazines – to access both local and national news. *See Nielsen Consumer Survey* at Tables 097 and 098. This survey also clearly demonstrated the emergence of cable television as a significant source of news and information. *See Notice* at ¶¶ 42, 92 (asking whether various nonbroadcast media outlets, especially cable and satellite television, were good substitutes for broadcast programming, particularly news). A considerably higher number of households currently subscribe to cable television than to a daily newspaper (*see Nielsen Consumer Survey* at Table 079), and, for consumers who receive their national news from television, a slightly higher number reported watching national news on cable or satellite, rather than broadcast, channels in the past week. *See id.* at Table 016. Cable has even emerged as a very significant source of local news. *See id.* at Table 008 (among consumers who obtain their local news from television, only a modestly higher number reported watching broadcast, rather than cable or satellite, channels for local news within the past week).[93] The Nielsen survey also demonstrated that many (although not all) consumers viewed broadcast television, cable and satellite news channels, daily newspapers and radio all as substitutes for each other in obtaining local or national news. *See* Tables 021, 024, 026, 027, 030, 032, 045, 046, 050, 057 and 061.

These recent studies, moreover, only confirm other numerous reports as to the growth of additional media as competitors to broadcast stations and to daily newspapers in the provision of national and local news. In previous proceedings, NAB has documented the growth of the Internet as a news source generally and as a source of governmental, political and campaign information specifically.[94] These trends have only continued, as the number of persons going online for political news specifically increased by 11% between 2000 and 2002. *See Pew 2002 News Report* at 15. The Commission itself has documented the continuing growth of local and regional cable news services so that, as of July 2002, "as many as 22.3 million cable subscribers had access to local or regional news programming." *OPP Video Study* at 126 (also noting that cable news "networks are increasingly moving into smaller markets").

This ever growing competition from the Internet, cable and other news sources has clearly been a primary cause of the drop in viewership levels for national and local news on broadcast television. According to very recent research, regular viewership of local broadcast

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[93] Candidly, NAB is somewhat skeptical of these results because the high number of people who reported watching local and national news on cable or satellite, rather than broadcast, channels may include persons who in fact reported their viewing of broadcast channels via cable or satellite systems as the viewing of cable and satellite channels. But despite questions as to the exact levels of viewing of local and national news on broadcast and cable channels, it remains clear that cable television has increasingly become a substitute for broadcast television in the provision of news and information to consumers.

[94] *See* Reply Comments of NAB in MM Docket Nos. 01-235 and 96-197 at 6-8 (filed Feb. 15, 2002). In these comments NAB also documented the rapid growth in Internet usage among minority groups and women.

news has fallen from 77% in 1993 to only 57% in 2002. *Pew 2002 News Report* at 5.[95] The regular audience for national network news has similarly dropped from 60% of the public in 1993 to 32% today (which is roughly the same size as the total cable news audience). *Id*. Moreover, this trend toward smaller viewing audiences for broadcast news will likely only continue, as the audience for broadcast television news is older than for cable news. *Id*. at 8.

From the above discussion and the FCC's own studies, it is clear that broadcasters no longer dominate the "information market relevant to diversity concerns." *Report and Order*, 100 FCC 2d at 25. Rather, this information market includes a wide variety of broadcast and nonbroadcast media that vigorously compete for consumers' attention and that consumers regard as substitutable to a substantial degree. This recent and growing expansion in the significance of nonbroadcast media in the information marketplace must undercut, at least to a considerable extent, the diversity rationale for maintaining a thicket of broadcast-only local ownership restrictions.

IV. The Commission Should Decline To Adopt Either A Case-By-Case Approach Or A Voice-Dependent Single Local Ownership Rule.

Given the dramatic changes in local media markets described in detail above, the Commission must clearly now reform its broadcast ownership rules to reflect today's highly competitive and diverse mass media environment in which broadcasters are no longer preeminent. The *Notice* (at ¶¶ 106-124) proposed several approaches as possible alternatives to the current regulatory regime, including adopting a case-by-case approach or a single, voice-dependent local ownership rule. NAB urges the Commission to refrain from adopting either of these proposals. An entirely case-by-case approach appears for a variety of reasons to be

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[95] *See also* Powers, *Toward Monopolistic Competition in U.S. Local Television News* at 77-79 (describing decline in viewing of local television news during 1990s, due at least in part from competition by cable and perhaps the Internet).

practically untenable. The use of "voice" tests has in the past raised myriad difficult questions about defining and counting voices, and has also disadvantaged unfairly small market broadcasters, especially television broadcasters. Beyond the difficulties with voice tests generally, the Commission's proposal to adopt a single, voice-dependent local ownership rule is overly complex and will raise virtually insoluble problems as to the comparison and weighing of various types of media.

A. A Case-by-Case Approach Is Practically Untenable.

The Commission should reject a case-by-case approach to addressing proposed local media combinations. Such an approach – even one utilizing presumptions or screens – would undoubtedly cause considerable uncertainty and delays, would increase transaction costs for applicants, and would increase administrative burdens for the Commission. For instance, a case-by-case approach could in effect require each applicant proposing a station combination to submit a customized competition and diversity analysis based on the unique circumstances of every proposed transaction. Such a requirement would be burdensome, time-consuming and expensive for applicants, and reviewing large numbers of individualized competition and diversity analyses would also be administratively burdensome for the Commission and would likely result in slower FCC resolution of proposed transactions.

Indeed, NAB predicts that a case-by-case approach would entail many of the problems inherent in the Commission's current "flagging" process for proposed radio station combinations, which has resulted in some proposed transactions remaining "pending for several years."[96] Such lengthy and indeterminate delays can amount to *de facto* denials, as parties to

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[96] Separate Statement of Commissioner Kevin J. Martin to *Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking* in MM Docket Nos. 01-317 and 00-244, FCC 01-329 (rel. Nov. 9, 2001) ("*Local Radio Ownership NPRM*").

transactions subjected to these delays often simply terminate their arrangements. Surely the Commission's unhappy experience with its radio flagging procedure has demonstrated why utilizing a case-by-case approach (even one supplemented with screens or presumptions) is practically untenable. Because the Commission's utilization of a case-by-case approach for only the limited number of radio transactions that do not satisfy the specified "50/70" screen has resulted in delays amounting to "several years," the adoption of a case-by-case approach for all proposed broadcast transactions would undoubtedly produce unacceptable administrative uncertainty and delays.

B. For a Variety of Reasons, Voice Tests Are Inherently Problematic.

Because of the myriad definitional and other problems raised by voice tests generally, NAB urges the Commission to refrain from basing any new approach to broadcast ownership regulation on such tests. Voice tests have not served the Commission well in the past and appear even more problematic in today's digital, multichannel environment.

In the past, the Commission's overly narrow conception of what constitutes a "voice" has produced indefensible inconsistencies between the Commission's rules,[97] and, perhaps even more importantly from NAB's standpoint, has disadvantaged small market broadcasters. As NAB has previously argued, local ownership rules based on narrowly-defined voices tests (such as the television duopoly rule) prevent broadcasters in smaller markets from achieving the

[97] For example, under the current television duopoly rule, the Commission counts only full power broadcast television stations as voices, but counts television and radio stations, daily newspapers and cable operators as voices under the radio/television cross-ownership rule. This glaring inconsistency prompted the D.C. Circuit Court of Appeals to invalidate the extremely narrow definition of voices under the television duopoly rule. *See Notice* at ¶ 76.

efficiencies inherent in joint ownership and from providing the programming and other public interest benefits made possible by these efficiencies.[98]

Adoption of circumscribed voice tests that disfavor small market broadcasters is particularly unfortunate because the benefits to be gained from common ownership are likely to be greater in those smaller markets where the tests prevent such joint ownership. For example, a study conducted for the Commission's 1998 biennial review showed that the positive economic effects associated with joint newspaper/broadcast operations are the greatest in smaller markets, and that joint ownership of newspapers and broadcast stations "could have a significant impact on the efficiency of operations in smaller markets, especially for marginally performing" outlets.[99] Not only are the benefits derived from common ownership likely to be greater in smaller markets, the need for joint ownership of media outlets is often greater in smaller markets. As shown in Section V.C. below, medium and small market television broadcasters, especially those who are not the ratings leader in their markets, are facing unprecedented financial pressures, which will threaten both the long-term financial viability of these lower-rated stations and the viability of many local news operations in smaller markets. A voice test that allows joint ownership of television stations only in the top 50 markets does nothing to enhance the viability of those small market outlets most likely not to survive without the efficiency gains and cost

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[98] *See, e.g.*, NAB Petition for Partial Reconsideration and Clarification of the Revised Broadcast Local Ownership and Attribution Rules in MM Docket No. 91-221 at 3-6 (filed Oct. 18, 1999) (pointing out that the duopoly rule voice test would allow broadcasters to take advantage of the benefits of joint television station ownership in fewer than 50 DMAs).

[99] Bond & Pecaro, *A Study to Determine Certain Economic Implications Of Broadcasting/Newspaper Cross-Ownership*, attached as Appendix B to NAB Comments in MM Docket No. 98-35 at 5-6, 26 (filed July 21, 1998) ("*Bond & Pecaro Study*"). This study found that efficiency gains from joint ownership of newspaper and broadcast operations would be the most significant in proportional terms to small market radio and television stations, "where even small cost savings can create a sharp increase in operating profits." *Id*. at 5.

savings derived from common ownership. In sum, the Commission's traditional utilization of very narrowly drawn voice tests has, in effect, provided the most flexibility for broadcasters in the largest media markets where it is the least needed, and the least flexibility in the smallest markets where it is the most needed.

Even assuming that the Commission in this proceeding would abandon its unduly narrow conception of a "voice" that has so disadvantaged small market broadcasters, NAB still urges the Commission not to adopt a voice-dependent approach to local ownership regulation. The vast proliferation of voices in today's digital, multichannel environment makes the whole concept of counting voices inherently problematic. Assume, for example, that the Commission were to attempt to count all the media voices actually contributing to the "information market," *Report and Order*, 100 FCC 2d at 25, and available to consumers in local markets.[100] If such a properly broad voice count were utilized, then the Commission would find that local media markets – even only mid-sized ones – are served by literally hundreds of voices.[101] Indeed, consumers

[100] These media would include commercial and noncommercial broadcast television and radio stations; Class A and other low power television stations and low power radio stations; all MVPDs including incumbent cable operators, cable overbuilders, DBS operators and others; satellite radio; daily, weekly, foreign language and other specialty newspapers; national, regional and local magazines and periodicals; and the Internet.

[101] This is shown by the very large number of voices counted in previous studies that in fact failed to consider many of the outlets available to consumers. The *Hearst-Argyle Media Voices Survey* (which failed to consider the Internet, low power or satellite radio, local or national magazines, or weekly, foreign language or other specialty newspapers) found 228 voices in the Minneapolis-St. Paul DMA, 209 voices in the Albuquerque-Santa Fe DMA, and even 102 voices in a DMA as small as Fargo, North Dakota. The *FCC Media Outlet Study* -- which considered only full power broadcast stations, daily newspapers, and DBS and cable systems (each counted as just a single voice) -- found 59 voices in the Birmingham, AL Arbitron market, 60 voices in the Little Rock, AR Arbitron market, and 53 voices in the Burlington, VT market. And even counting the myriad voices within each local market would still underestimate the number of voices actually available to consumers due to the substantial number of "out of market" outlets routinely accessed by consumers. *See supra* Section II.

today may access so many media outlets that the concept has arguably lost its usefulness as the basis for a structural ownership rule.[102]

Even assuming, however, that the basic concept of "voices" remains relevant and meaningful in a digital multichannel environment, NAB believes that voice tests defy rational and consistent application. As a general matter, utilization of a voice test would involve making very difficult determinations as to the counting of voices. Should a cable or DBS system count as only a single voice or as multiple voices (and, if so, how many voices)? Should the answer depend on the number of news and information channels that the cable or DBS system carries, and whether the system carries a local or regional news channel, such as News Channel 8 here in the Washington, DC area? Similarly, if a television broadcaster utilizes digital technology to multicast multiple programs, does that broadcaster still count as only a single voice?[103] And how on earth should the Commission count the number of voices accessible via the Internet, which allows consumers anywhere access to "content" as "diverse as human thought"? *Reno*, 521 U.S. at 870.

If, moreover, the Commission were to adopt a new voice test in this proceeding, it would be faced with the extraordinarily difficult task of defining the appropriate geographic market. Any ownership rule based on the number of media voices requires the Commission to define the geographic area in which those voices are to be counted. NAB submits that it is virtually

[102] For example, the New York, NY DMA has 302 media voices even by the conservative count in the *Hearst-Argyle Media Voices Survey*, which failed to consider a number of media. If the FCC were to count all the media actually accessible to consumers in the New York DMA, that number would be considerably higher. NAB wonders how the Commission would formulate a meaningful voice-based test in such a market.

[103] For example, WRAL in Raleigh, North Carolina currently uses a second digital channel to carry all news. WCYB in the Tri-Cities, Tennessee/Virginia DMA carries its NBC network programming on a first digital channel and, on a second channel, carries WB network programming which has no analog outlet in that market.

impossible to define rationally this "geographic area over which to measure diversity," *Notice* at ¶ 47, when attempting to apply a voice test that includes disparate media that serve widely varying geographic areas. For instance, some of the media serving a local area will have national scope (such as DBS, satellite radio, and the Internet), while some (such as television stations) will serve much more moderately-sized area (DMAs) and others will serve still more localized areas (such as many radio stations, LPTV stations, and weekly newspapers). Defining a geographic market for purposes of a voice test will thus be particularly challenging, assuming that any new voice test adopted by the Commission would count the appropriately wide array of media outlets that contribute to the "information market relevant to diversity concerns." *Report and Order,* 100 FCC 2d at 25 (finding, even before the advent of the Internet and satellite television and radio services, that this market encompassed television and radio stations, cable, and numerous print media including newspapers, magazines and periodicals).[104] The service areas of these different audio, video and print media are clearly not congruent, thereby complicating the task of defining a *single* geographic area in which all relevant voices are supposed to be counted.

NAB also points out that the markets served by various audio, video and print media do not fall within "neat and tidy" geographic areas. The Commission will therefore be forced to consider how to account for many media outlets whose service areas fall only partially within whatever geographic area (such as an Arbitron market or DMA) is designated as the appropriate

[104] Indeed, perhaps this difficulty of defining the geographic market when counting a wide array of media that serve disparate geographic areas prompted the Commission in the past to use unduly constricted voice tests limited to a very small number of media or, in the case of the current television duopoly rule, to only a single medium.

market in which to count voices.[105] This is not an insignificant problem even when trying to account for outlets in the same medium, let alone outlets of different types.[106]

Finally, NAB emphasizes that defining a meaningful and appropriate geographic market for diversity concerns is made even more difficult by the fact that consumers routinely access media from outside of their local geographic areas. As BIA Financial Network found in its new study, only about two-thirds, on average, of the listening within an Arbitron market is attributable to commercial radio stations listed by Arbitron as being home to that market. And in some Arbitron markets most of the radio listening is to out-of-market stations. Similarly, in smaller DMAs, television stations located in adjacent DMAs can account for significant portions (in some cases 25% or more) of the television viewing in those smaller markets. *BIA Out-of-Market Voices Study* at 6, 8, 13. Given these surprisingly high levels of "out of market" listening and viewing, especially in smaller markets, any voice test that counts media outlets within traditional geographic areas such as Arbitron markets or even DMAs will not accurately reflect the true number of different voices available to consumers. For all these reasons, NAB believes that defining an appropriate geographic market for purposes of applying a broad voice test

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[105] Would, for example, the Commission count a broadcast station as serving a geographic market only if a certain percentage of the station's service contour fell within that defined area? Or should a broadcast or cable outlet (or a newspaper or magazine) be counted as serving a geographic market only if a certain percentage of the outlet's audience or circulation is within that geographic area?

[106] *See* Comments of NAB in MM Docket No. 00-244 at 5-6, 11 (filed Feb. 26, 2001) (because of the scattered location and widely varying signal strength and coverage areas of radio stations, it is very difficult to find an acceptable geographic definition for radio markets, and NAB consequently urged the Commission to retain its contour overlap method of defining radio markets for purposes of applying the local radio ownership rules).

encompassing the variety of media actually accessible to consumers will prove a virtually impossible task.[107]

C. A Voice-Dependent Single Local Ownership Rule Would Be Overly Complex and Would Result in Arbitrary and Irrational Comparisons between Media Outlets.

Given the serious problems associated with voice tests generally, NAB opposes the replacement of the current outlet specific approach with "a local single media ownership rule," which would be "*dependent on the number" of voices "in any particular market*." *Notice* at ¶ 109 (emphasis added). The Commission's "single rule" approach would therefore necessarily involve all the difficulties inherent in counting voices discussed in detail in Section IV.B.[108] Adoption of a voice-dependent single local ownership rule would also force the Commission to define the appropriate geographic area in which the total number of voices are to be counted *and* within which the "cap" on the total local ownership interests of entities would be applied.[109] As described above, this definitional task would be extremely challenging because different audio, video and print media serve widely varying geographic areas and because consumers easily and

[107] NAB also notes that the geographic market relevant to diversity concerns may likely not be "coterminus" with the geographic market for advertising. *Notice* at ¶ 110. As discussed above, consumers easily and frequently access media located outside of traditional advertising-oriented geographic areas such as Arbitron markets. Thus, it would appear that the "geographic area over which to measure diversity" may likely be broader than the relevant geographic market for advertising. *Id*. at ¶ 47.

[108] A single ownership rule "dependent on the number" of voices in individual markets would, for example, raise questions as to whether cable, DBS and multicasting broadcasters should constitute a single voice or multiple voices and how to count the number of voices made available by the Internet.

[109] NAB presumes that such a single local ownership rule would entail an overall per-market cap to limit the number and type of outlets or voices that could be commonly owned in each market, depending on the total number of voices in the market. The *Notice* does not provide clarification on this point. Indeed, the generality of the Commission's discussion of this "single rule" approach may suggest the considerable difficulties of formulating such a rule.

regularly access media outlets located outside of their local geographic areas. *See* Attachment A, *BIA Out-of-Market Voices Study*.

Beyond these difficulties raised by voice tests generally, this "single rule" approach would entail extraordinarily difficult questions of comparison between various media outlets and of "weighing" different types of media voices. *See generally Notice* at ¶¶ 112-124. If the Commission were to establish overall per-market caps on local media ownership, then the Commission would have to address questions of comparison and weighing, such as the following:

- Would daily newspapers and full power broadcast television stations be treated as equivalent under any local cap? Or should a television station be equivalent only if it were owned by, or affiliated with, a major network and had a local news operation? But the news staff of even a network affiliate that emphasizes local news is dwarfed in comparison by the size of the news staff on a major daily newspaper. Given the FCC's emphasis in this proceeding on outlets that provide news and public affairs information (*see Notice* at ¶ 111), should a broadcast television station therefore be given less weight under any local ownership cap than a daily newspaper?

- How should television stations and radio stations be "weighed" relative to each other? Should television stations always be given more weight under a local ownership cap than radio stations? What if the television station at issue was an independent station with no local news operation and the radio station was an all-news station, such as WTOP here in Washington, D.C.? Can the Commission formulate a local ownership limit that weighs particular media outlets depending on the *content* of their programming (*i.e.*, the more news offered by an outlet, the greater weight given to that outlet under any local ownership limit)?[110]

- How should the relative weights of broadcast television stations and cable systems be determined, given that cable systems carry dozens of channels of programming and broadcast stations only one (at least in the analog environment)? Should the comparison change as television broadcasters convert to digital and have the capability to multicast? Or should the relative

[110] And even comparing outlets in the *same* medium would not always be straightforward. Radio stations, for instance, have widely varying signal strength and coverage areas and sometimes hours of operation.

> weight of cable systems and television stations depend on other factors, such as whether the television station in question has a local news operation and whether the cable system offers a local or regional news channel?

Clearly, creating a single local ownership rule under which all the media interests controlled by a single entity would be counted or weighed and "capped" raises complex questions of comparing media outlets of varying type and scope.[111] The difficulty of rationally comparing and weighing widely varying media outlets should lead the Commission to eschew this approach, especially in light of the Commission's goal to establish judicially sustainable local ownership regulations.[112] Attempting to formulate for the first time a single local ownership rule is particularly ill advised in this regard, as determinations about the relative "weight" to be accorded to media outlets under a local cap would be ripe for challenge as arbitrary and capricious by any entity who felt disadvantaged by the Commission's determinations.[113] When these difficulties are combined with the additional problems associated generally with voice tests (especially in defining the appropriate geographic market), then the creation of a single local ownership rule appears overly complex, impracticable, and susceptible

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[111] Theoretically, the revenues of various media outlets could be used to represent the "weight" that should be accorded to those outlets under a single local ownership cap. But this measure would also fail, NAB believes, due to the lack of accurate and available revenue information for the various types of media outlets to be counted under a single rule approach. The Commission simply would not have access to the revenue information needed to make this approach viable.

[112] *See* Separate Statement of Commissioner Kevin J. Martin to *Notice* (expressing hope that this rulemaking proceeding will end "with a clear, reasoned and justified approach to ownership restrictions that will withstand judicial scrutiny").

[113] *See, e.g., Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 764 (6th Cir. 1995) (court found FCC's rules prohibiting certain cellular providers from obtaining PCS licenses were arbitrary because the Commission failed to provide the "requisite reasoned basis" for the prohibition, such as "a supported economic justification"); *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1171-73 (D.C. Cir. 1994) (FCC acted arbitrarily and capriciously in failing to differentiate between licensees facing substantially different circumstances, and neglected to "justify its failure to take account of circumstances that appear to warrant different treatment for different parties").

to successful legal challenge. NAB sees no need for the Commission to adopt such a complex new approach in light of its specific recognition of a simpler and less radical approach, as discussed in Section V.

V. The Commission Should Eliminate Its Cross-Ownership Rules And Maintain Limited Same-Outlet Restrictions.

In light of the serious problems with either a case-by-case approach or a single voice-dependent local ownership rule, NAB urges the Commission to adopt another option mentioned in the *Notice*. Specifically, the Commission should (1) "eliminate the cross-ownership rules based on clear evidence" (which NAB discussed in detail in Sections II. and III.) "that Americans today rely on a far wider array of media outlets than they did decades ago, when the cross-ownership rules were first adopted," *Notice* at ¶ 110; and (2) maintain limited "restrictions" on "same-outlet" ownership in local markets so as to preserve "competition among those outlets that directly compete with each other." *Id*. Consistent with this option, NAB urges the Commission to repeal the newspaper/broadcast and radio/television cross-ownership rules; to reform the television duopoly rule so as to allow the formation of duopolies in medium and small markets; and to comply with congressional intent by giving full effect to the local radio ownership standards set forth in the 1996 Act.[114]

NAB believes this approach would have several significant advantages. This approach is less radical and would involve less change for both the Commission and for regulated entities than the creation of a new single local ownership rule covering all types of media, and would therefore likely produce fewer unintended consequences in the marketplace. Eliminating the cross-ownership rules that, by their terms, address different types of media would also reduce the

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[114] As expressed in joint comments filed today with the Network Affiliated Stations Alliance, NAB also supports retention of the national television ownership cap.

need to formulate standards for comparing or weighing disparate media outlets/voices. NAB additionally believes the retention of radio and television ownership rules that are actually based on the structure of broadcast ownership in local markets will be both more administratively practicable and effective in promoting true competition in local media markets than an ill-defined and amorphous voices test. Finally, this approach is fully justified, given the lack of any viable competition or diversity rationales for retaining the cross-ownership rules.

A. The Newspaper/Broadcast Cross-Ownership Rule Should Be Repealed.

NAB opposed the adoption of the newspaper/broadcast cross-ownership rule in the 1970s, and has since urged the Commission to repeal the ban. As NAB argued in detail in earlier comments,[115] the Commission's absolute prohibition on common ownership of newspapers and broadcast facilities in the same market has never been adequately justified. Despite several attempts commencing in the 1940s to identify actual abuses or concrete problems presented by newspaper ownership of broadcast outlets,[116] the Commission has consistently failed to establish the existence of any competitive or other harms arising from newspaper/broadcast cross-ownership. Even in the order adopting the newspaper/broadcast cross-ownership rule, the Commission found no evidence of "specific non-competitive acts" by newspaper-owned stations and no evidence of an effect on advertising rates charged by television stations as a result of newspaper ownership. *Second Report and Order* in Docket No. 18110, 50 FCC 2d 1046, 1072-73 (1975) ("*Newspaper R&O*"). The Commission also found no evidence that newspaper-owned

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[115] *See* Comments of NAB in MM Docket Nos. 01-235 and 96-197 (filed Dec. 3, 2001); Reply Comments of NAB in MM Docket Nos. 01-235 and 96-197 (filed Feb. 15, 2002).

[116] *See, e.g.*, Daniel W. Toohey, *Newspaper Ownership of Broadcast Facilities*, 20 Fed. Comm. B.J. 44 (1966) (describing FCC's major investigation in the 1940s of newspaper ownership of AM and FM stations).

stations had failed to serve the public interest or had performed less well than other stations. *Id*. at 1073, 1075, 1078. To the contrary, the FCC's own study concluded that newspaper-owned television stations showed a "statistically significant superiority" over other television stations "in a number of program particulars." *Id*. at 1078 n. 26.[117] Faced with this lack of an evidentiary basis to justify a strict cross-ownership ban, the Commission, in adopting the rule in 1975, was forced to speculate about the entirely "*theoretical* increase in . . . diversity which *might* follow" from the rule's application. *Id*. at 1078, 1083 (also referring to the "*mere hoped for* gain in diversity" stemming from operation of the rule) (emphasis added).

Given the speculative and unsubstantiated nature of both the record and the FCC's diversity rationale for adopting the cross-ownership prohibition in 1975, any court reviewing an FCC decision to retain the ban today would expect the Commission after "years of experience" with the rule, to produce "evidence" indicating that the rule has "achieve[d]" the diversity "benefit[] that the Commission attribute[d] to" it. *Bechtel II*, 10 F.3d at 880. It is clear, however, that the Commission has even less basis for retaining the newspaper cross-ownership rule today than it had for adopting the rule in the less competitive and less diverse media environment of 1975, and therefore the Commission must, under the Section 202(h) biennial review requirement, "repeal or modify" it.

Certainly no competition-related rationale can serve to justify retention of the newspaper cross-ownership ban today. As previously described, the Commission did not rely on

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[117] Specifically, the Commission found that co-located newspaper-owned television stations programmed 6% more local news, 9% more local non-entertainment programming, and 12% more total local programming including entertainment than did other television stations. *Newspaper R&O*, 50 FCC 2d at 1094, Appendix C. Another study similarly found that "television stations co-owned with a daily newspaper in the same local market broadcast 41 minutes more of local programming" in the composite week examined "than television stations that were not cross-owned." Busterna, *Television Station Ownership* at 65.

competitive concerns when adopting the rule in 1975, and such concerns clearly cannot warrant its retention in today's greatly more competitive media marketplace. *See, e.g., OPP Video Study* at ii (detailing the "increasingly competitive" video marketplace). Studies previously submitted to the Commission have demonstrated, moreover, that permitting newspaper/broadcast cross-ownership should raise no serious competitive concerns.[118]

Beyond creating a much more competitive media marketplace, the vast proliferation of broadcast and nonbroadcast media outlets has also greatly expanded the array of viewing and listening choices available to consumers.[119] Today consumers also utilize a wide range of media for both entertainment and informational purposes and regard these various sources as substitutable to a significant degree. *See* Waldfogel, *Consumer Substitution Among Media* and the *Nielsen Consumer Survey*, discussed in Section III.C.4. These and other studies have also shown that consumers, due in large part to the emergence of cable television and the Internet, rely to a significantly lesser degree on daily newspapers and broadcast television stations for news and information than in the past. *See Nielsen Consumer Survey* at Tables 008, 016, 079

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[118] *See, e.g.,* Kent Mikkelsen, Economists Incorporated, *Horizontal and Vertical Structural Issues and the Newspaper-Broadcast Cross-Ownership Ban* (Dec. 2001), attached as Appendix IV to Comments of Newspaper Association of America in MM Docket Nos. 01-235 and 96-197 (filed Dec. 3, 2001) (showing that the level of concentration of newspaper and broadcast advertising revenues had *decreased* about 40 percent from 1975 levels); Economists Incorporated, *Structural and Behavioral Analysis of the Newspaper-Broadcast Cross-Ownership Rules,* attached as Appendix B to Comments of Newspaper Association of America in MM Docket No. 98-35 (filed July 21, 1998) (study of over 1400 daily newspapers provided no indication that cross-owned newspapers charged higher advertising prices than other newspapers); *Ex Parte* of Media General, Inc. in MM Docket Nos. 01-235 and 96-197 (filed May 31, 2002) (attaching memorandum summarizing existing empirical literature on the economic effects of cross-media ownership, which almost uniformly concludes "that cross-ownership has no effect on advertising prices or actually reduces them").

[119] The *FCC Media Outlet Study*, the *Hearst-Argyle Media Voices Survey*, the *BIA Out-of-Market Voices Study*, and other studies discussed in Section II. clearly demonstrate the wide array of broadcast and nonbroadcast outlets now available to consumers in local markets of all sizes.

(reporting that more households subscribe to cable than to a daily newspaper and that cable strongly competes with broadcast television for viewers for both national and local news). The Pew Research Center for the People & the Press has also documented the growth of cable and the Internet as competitors to broadcast stations and daily newspapers. Beyond describing the significant decline in viewership for local and national broadcast television news (as discussed in Section III.C.4.), the *Pew 2002 News Report* documented the continuing decline in newspaper readership, especially among people under 30 but even among those in the 35-49 age category. *See id*. at 3-5, 10 (in just the past five years, the percentage of people who responded "yes" when asked if they had a chance to read a newspaper yesterday declined by nine percent).[120]

Not only do consumers today clearly rely less on daily newspapers and television broadcast stations for news and information than in 1975, available studies indicate that commonly owned media outlets are capable of providing diverse viewpoints on issues of public concern, including political and campaign issues. *See* Hicks and Featherston, *Duplication of Newspaper Content* at 551-53 (study found that jointly owned newspapers in the same local markets provided diverse and nonduplicated content and opinion). More recent studies of jointly owned newspapers and broadcast stations have specifically found that such common ownership did "not result in a predictable pattern of news coverage and commentary on important political events between the commonly-owned outlets." Pritchard, *Viewpoint Diversity Study*, Discussion Section. *See also* Section III.C.3.

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[120] The Newspaper Association of America ("NAA") has also reported on the declining penetration rates of all traditional news media, including newspapers, television and radio, due to competition from other media. *See* NAA, *Leveraging Newspaper Assets: A Study of Changing American Media Usage Habits* at 4-7, 20 (2000) (specifically finding that people between the ages of 18 and 24 are just "as likely to use the Internet for news and information as they are to read a newspaper," and that, even among 18-34 year olds, the audience for newspapers is "only slightly larger" than the audience for the Internet).

In light of these studies, the speculative diversity rationale underlying the adoption of the cross-ownership rule can no longer be regarded as sufficient justification for retention of the ban. This is especially true given the ban's application to only *broadcast* stations and daily newspapers. Due to the emergence of cable television as a significant source of news and information, a rule that, for example, prevents the common ownership of a single radio station (which might well be music, rather than news, oriented) and a daily newspaper, but permits the common ownership of a daily newspaper and a cable system (even one providing both national news services and a local or regional news channel), is a "glacial remnant[] of a regulatory ice age."[121]

But even beyond the Commission's past failure and continued inability to justify the newspaper/broadcast cross-ownership rule on either competitive or diversity grounds, the record before the Commission now makes the case for eliminating the rule compelling. As NAB and many other commenters explained in previous comments, newspaper/broadcast combinations would allow both newspapers and broadcasters – which are facing unprecedented competition in a digital, multimedia environment – to maintain their financial viability and to strengthen their operations, especially in smaller markets. For example, a study conducted for NAB in 1998 concluded that allowing newspapers and broadcast stations to combine "would have a positive economic impact upon these businesses" by increasing "operating cash flow" between "9% and 22%" and "could have a significant impact on efficiency of operations in smaller markets, especially for marginally performing newspaper and television stations." *Bond & Pecaro Study*

[121] Testimony of Jeffrey A. Marcus, President and Chief Executive Officer, Chancellor Media Corporation, Transcript of FCC En Banc Hearing on Local Broadcast Ownership at 66 (Feb. 12, 1999).

at 5, 26.[122] As set forth in detail in Section V.C., television broadcasters in smaller markets (particularly those who are not the ratings leader in their markets) are currently facing unprecedented financial challenges. Some small and medium market television broadcasters have consequently already experienced difficulties in maintaining their local news operations, and many more are likely to struggle to retain these operations in the future, especially as they bear the considerable costs of their transition to digital broadcasting. The repeal of the newspaper/broadcast cross-ownership rule would therefore help maintain the financial viability of broadcast and newspaper operations in smaller markets, forestall likely cut backs in local television news services, and even encourage the development of new broadcast news operations.[123] In this way, repeal of the cross-ownership rule should enhance both diversity and localism.

In addition to precluding the efficiencies and the economic and public interest benefits that would flow from the joint ownership of traditional newspaper and broadcast outlets (*see Bond & Pecaro Study* at 5, 26), the cross-ownership rule inhibits broadcast and newspaper entities from pooling resources and expertise to create new innovative media services, especially on-line services that have features of both the electronic and print media or services using the capabilities of digital television. *See Notice* at ¶ 68 (inquiring how ownership rules affect

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[122] *Accord* Lorna Veraldi, *Carpooling on the Information Superhighway: The Case for Newspaper-Television Cross-Ownership*, 8 St. Thomas L. Rev. 349, 365-66, 369-70 (1996) (cost savings from allowing newspaper/broadcast combinations "could mean the difference between extinction and survival for some newspapers and television stations," and should "encourage better local service by rewarding production of local news with increased revenue from multiple uses of the same production resources").

[123] *See, e.g.*, *M Street Daily* at 1 (Dec. 7, 2001) (reporting that newspaper publisher Knight-Ridder is "poised to buy" radio stations "it could flip to all-news" if FCC relaxes newspaper/broadcast cross-ownership rule, and also speculating that other newspaper owners, particularly Gannett, would "return to radio" if the rule were relaxed).

innovation by broadcasters). A major study submitted to the Commission in 1998 confirmed that, due to the development of new media such as the Internet, "the benefits of cooperation between traditional newspaper and broadcast operations" have increased.[124] Thus, the costs of the cross-ownership ban have correspondingly increased. *Besen and O'Brien Economic Study* at 1, 7 ("consumers of information may experience higher prices, less attractive product offerings, or slower innovation than if owners of broadcast stations and newspapers were free to operate under common ownership").[125] Especially in light of the severe financial difficulties recently experienced by a wide range of communications businesses and Internet ventures, the combined expertise and resources of newspaper and broadcast operations are needed more than ever to ensure the full development of new, innovative media services.[126]

In sum, NAB urges the Commission to "repeal" the newspaper/broadcast cross-ownership prohibition because it is "no longer in the public interest." Section 202(h), 1996 Act. The Commission had no concrete evidence or even a sound rationale for adopting this rule in 1975, as it merely reflected the (now outmoded) regulatory philosophy of promoting the maximum diversity of ownership at all costs. *See supra* Section III.C.1. But regardless of the Commission's unsupported speculations about "mere hoped for" gains in diversity resulting from

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[124] Stanley Besen and Daniel O'Brien, Charles Rivers Associates, Inc., *An Economic Analysis of the Efficiency Benefits from Newspaper-Broadcast Station Cross-Ownership*, attached as Appendix B to Comments of Gannett Co., Inc. in MM Docket No. 98-35 (filed July 21, 1998) ("*Besen and O'Brien Economic Study*").

[125] *Accord* Veraldi, *Carpooling on the Information Superhighway* at 364-65 (the "societal benefits of encouraging local news outlets to pool resources and invest in innovations have come to outweigh the potential harm" of newspaper cross-ownership).

[126] *See* Toohey, *Newspaper Ownership* at 54 (recognizing in the 1960s the "highly significant" advantages that a newspaper would bring to a new media operation, especially for services "which are undeveloped and which demand a good deal of staying power and patience before their unrealized potential will bring profits").

the rule, *Newspaper R&O*, 50 FCC 2d at 1078, the cross-ownership prohibition, at the best, is anachronistic in today's digital environment. And at the worst, the rule actually operates to harm diversity, localism and innovation by inhibiting the development of new media services and by precluding struggling broadcast and newspaper entities (particularly those in small markets) from joining together to improve, or at least maintain, existing local news operations in the current competitive marketplace.

B. The Radio/Television Cross-Ownership Rule Should Also Be Eliminated.

The radio/television cross-ownership, or one-to-a-market, rule has always rested on a fragile foundation. A closely divided Commission first adopted the rule in 1970 in an effort to maximize the "diversity of ownership" in each local area. *First R&O*, 22 FCC 2d at 311 (adopting order essentially precluding any single entity from owning more than one broadcast station of any kind in the same local market). Dissenting Commissioners at the time strongly criticized the rule and this rationale for it,[127] and, in fact, the original rule was quickly amended on reconsideration to permit the ownership of AM-FM combinations. *See Memorandum Opinion and Order* in Docket No. 18110, 28 FCC 2d 662, 671 (1971).

By 1989, moreover, the Commission, as discussed in Section III.C.1., had explicitly rejected the position that "pursuing maximum ownership diversity" always served "the public interest," and consequently relaxed its prohibition against the common ownership of radio and television stations in the same market. *Second Report and Order*, 4 FCC Rcd at 1743. Congress

[127] *See* Dissenting Statement of Commissioner Robert Wells, 22 FCC 2d at 336-37 (stating that he had "no doubt" that the radio/television cross-ownership rule would "disserve the public interest," and that the majority had simply "posit[ed]" that "maximum diversity" of ownership was an appropriate goal "with very little analysis" and with "little appreciation of, or attention to, possible consequences" of this decision "on broadcast service to the public"). *See also* Concurring and Dissenting Statement of Chairman Dean Burch, 22 FCC 2d at 335 (complaining that Commission had adopted "a rule which applies to areas of ownership least needing attention, if at all").

in the 1996 Act directed the Commission to consider further relaxing the cross-ownership rule, and in 1999, the Commission amended the rule to its current form. *See Local TV Ownership Order*, 14 FCC Rcd at 12908.[128]

The Commission should now take the final step and repeal the radio/television cross-ownership rule which, in its current form and under current market conditions, does nothing to advance the public interest. *See Notice* at ¶ 100 (asking whether rule still serves the public interest). Indeed, the radio/television cross-ownership rule today primarily serves to limit radio station ownership arbitrarily. For example, the rule does not permit – under any circumstances and even in the largest markets – the common ownership of the maximum number of radio stations allowed under the local radio ownership rule (eight) and even a single television station. The rule, however, already allows the common ownership of two television stations (the maximum number permitted under the television duopoly rule) and up to six radio stations. Repeal of the radio/television cross-ownership rule would, as a practical matter, only permit the common ownership of one or two additional radio stations, in conjunction with a television station, in the largest markets.

Given the very limited effect of a repeal of the cross-ownership rule, the Commission will find it difficult to contend that the rule's elimination will harm the public interest, especially in today's competitive mass media marketplace. In light of the growth of broadcast and

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[128] The rule now permits a party to own a television station (or two television stations if allowed under the television duopoly rule) and any of the following radio station combinations in the same market: (i) up to six radio stations in any market where at least 20 independent voices remain; (ii) up to four radio stations in any market where at least 10 independent voices remain; and (iii) one radio station regardless of the number of independent voices in the market. In addition, in those markets where the cross-ownership rule permits parties to own eight outlets in the form of two television stations and six radio stations, the Commission will allow them to own one television station and seven radio stations instead. For purposes of this rule, the Commission counts television stations, radio stations, daily newspapers and wired cable services as "voices." 47 C.F.R. § 73.3555(c).

nonbroadcast media outlets in all markets since the 1970s (*see supra* Section II.), the Commission cannot reasonably contend that repeal of the rule will adversely affect the availability of diverse programming or viewpoints. NAB has described the expansion in the array of viewing and listening choices available to consumers as a result of the proliferation of all types of media outlets. *See supra* Section III.A. And as previously shown (*see* Section III.C.), consumers are not uniquely dependent on radio and broadcast television outlets for either entertainment or for informational purposes, but they utilize a wide variety of media (especially cable and satellite television) to obtain entertainment, news and information and regard these various sources as substitutable to a significant degree. The Commission can therefore no longer plausibly assert that the radio/television cross-ownership rule must be retained to ensure a diversity of entertainment and informational sources for consumers.

In addition, NAB emphasizes that the rule – like other broadcast-only restrictions – disadvantages local broadcasters in today's competitive multichannel environment. For example, the rule prohibits the owner of a single broadcast television station in a large market from also obtaining the maximum number of radio stations permitted under the local radio ownership rules (eight), but does not preclude a cable operator with a monopoly position in the local MVPD market from acquiring up to eight radio stations in that market.[129] With television and radio broadcasters facing unprecedented competition from cable, DBS, satellite and Internet

[129] And as a result of the recent elimination of the cable/broadcast cross-ownership rule, a local cable monopolist can now acquire in the same market one or two broadcast television stations (depending on the size of the market) and multiple radio stations.

radio, and other video and audio programming sources, a cross-ownership rule applicable only to local broadcast radio and television stations is inequitable and outdated.[130]

Accordingly, the Commission should eliminate the radio/television cross-ownership rule. It is no longer needed to ensure diversity, and primarily serves to limit radio station ownership arbitrarily and to handicap broadcasters in their efforts to compete in today's challenging digital marketplace. *See Bechtel I*, 957 F.2d at 881 (FCC has "duty to evaluate its policies over time," especially if "changes in factual and legal circumstances" occur); Section 202(h), *supra*. Particularly if the Commission decides to retain the local radio ownership rule and the television duopoly rule in some form (as NAB has in fact recommended in these comments), no plausible reason exists to also retain the cross-ownership rule, as any diversity or competition concerns can be addressed more directly by these other local rules.

C. The Commission Should Reform the Television Duopoly Rule to Allow Duopolies in Medium and Small Markets.

In light of the declining financial position of medium and small market television stations, the Commission should reform the television duopoly rule to allow the formation of duopolies in those markets. NAB proposes a new rule, based on stations' viewing shares, that would provided needed financial relief for lower-rated stations (which are particularly struggling financially), while still promoting diversity and competition by preventing the combination of two higher-rated stations in the same market.

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[130] As set forth in Section III.A., the Commission itself has documented a slight fall in the average number of radio listeners in recent years, possibly due to competition from CDs and downloaded MP3s. *FCC Radio Trends Report* at 19. The Commission has also concluded that, beyond cable and DBS, other competing video programming sources, including videos, DVDs, video games and Internet video streaming, may become significant in the marketplace. *OPP Video Study* at 75.

1. Television Broadcasters in Medium and Small Markets Are Facing Unprecedented Financial Pressures.

A number of factors – including the growth of new competitors, the cost of the digital television ("DTV") transition, and the decline in the compensation payments made by networks to affiliated stations – have combined to squeeze "profits in the smaller markets . . . like never before."[131] Substantial evidence discussed in detail below clearly demonstrates the declining financial position of medium and small market television broadcasters, and the particularly perilous financial situation of the lower-rated stations in these markets. These unprecedented financial pressures will threaten the long-term viability of lower-rated smaller market stations as independent entities, and will also threaten the continued viability of many local news operations, especially in medium and small markets.[132]

As documented in numerous press reports and studies, several factors have combined to place unprecedented financial pressures on television broadcasters today, especially those in smaller markets. Many television stations, particularly those in medium and small markets, are struggling to pay for the transition to digital broadcasting. The costs of the DTV transition, in both absolute and relative terms, are quite high.[133] The estimates of these costs "vary but they

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[131] Steve McClellan, *Small Towns, Big Problems*, Broadcasting & Cable at 20 (Aug. 6, 2001) (describing the difficult economic circumstances faced by television stations in markets ranked 75th and below).

[132] *See, e.g.*, McClellan, *Small Towns, Big Problems* at 20; Steve McClellan and Dan Trigoboff, *Benedek Couldn't Hang On*, Broadcasting & Cable at 6 (April 1, 2002) (reporting bankruptcy filing of Benedek, the owner of 23 medium and small market affiliates); John Smyntek, *Local TV Landscape Could Change, Conditions Ripe for Station Consolidation*, Detroit Free Press at 6E (Oct. 31, 2001) (anticipating consolidation in ownership of Detroit's television stations due in part to poor revenue performance "that will force some small owners with heavy debts to sell").

[133] These costs include "investing in a considerable amount of new equipment including a new transmitter and antenna, and possibly a new tower." BIA Financial Network, Inc., *State of the Television Industry 2001, Ownership Report: What Is Owned by Whom and Where* at 7 (2001) ("*BIA TV Industry Report*"). Broadcasters must also replace studio equipment, obtain digital

range between $1 million for a station to simply retransmit just network programming to as much as $20 million for a station with extensive news operations." *BIA TV Industry Report* at 7. Other estimates have placed the "average costs" of "building DTV" as between $2-$3 million per station. *GAO Digital Report* at 17. While these costs represent substantial outlays for all broadcasters, they are "overwhelming" for "many mid sized and small market stations and lower revenue stations in larger markets." *BIA TV Industry Report* at 9. Indeed, for stations with annual revenues below $2 million (which tend to be in the smallest 100 DMAs), transition expenses average a staggering *242 percent* of annual revenues, but these expenses represent only 11 percent of annual revenues for large market stations that were required to be transmitting in digital prior to May 2002. *GAO Digital Report* at 18.[134]

Beyond greatly increased expenses due to the DTV transition, local broadcasters are also facing a decline in overall revenues as a result of reductions in network compensation payments to affiliated stations. In recent years, the broadcast networks have cut the compensation fees that they traditionally paid to stations that carry their programming, and many expect compensation payments to be eliminated entirely in the future.[135] A new study on the finances of television

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programming, and "incur the costs of running two stations [*i.e*., an analog and a digital] during the transition period." General Accounting Office, Report 02-466, *Many Broadcasters Will Not Meet May 2002 DTV Deadline* at 9 (April 2002) ("*GAO Digital Report*").

[134] *See also BIA TV Industry Report* at 8 (for medium and small market stations, DTV costs "in many cases equal[] a large percentage of the present fair market value of the existing stations without any strong indication that the digital transmission would generate immediate additional revenues"); David Lieberman, *Small TV Stations Reel Under Order to go Digital*, USA Today at 1B (July 17, 2002) (industry analysts agree that small market stations have serious problems with financing digital transition, as small station owners are "lucky" to make "$300,000 a year in free cash flow," and "[i]t can cost $3 million to convert to digital").

[135] *See, e.g*., Katy Bachman, *Nets vs. Affiliates Battles Continue*, Mediaweek (April 8, 2002) ("all Big Three networks recently have negotiated contract renewals with affiliates that eventually wean the stations off compensation"); Bill Carter, *A Struggle for Control*, New York Times at C1 (April 23, 2001) ("networks are rapidly ending the compensation fees they have traditionally

stations in medium and small markets specifically showed that network compensation to affiliated stations in DMAs ranked 51-175 did decline substantially from 1997 to 2001.[136] Stations in these smaller markets, which have thinner profit margins than stations in larger markets, will also be disproportionately adversely affected by further reductions, or by the elimination, of network compensation.[137]

Local television broadcasters are, of course, bearing the expenses of the DTV transition and the loss of network compensation at the same time they are facing ever increasing competition from cable and other MVPDs. As described in Section III., television broadcasters face "continuing audience fragmentation" and "pressure on broadcast advertising revenues," especially as "cable systems are becoming stronger competitors in the local advertising market." *OPP Video Study* at ii, 135. These three factors – the costs of the digital transition, reductions in network compensation, and increased competition – have all combined to create a challenging competitive environment even for top-rated stations in smaller local markets. And for lower-rated stations in medium and small markets, these factors have resulted in financial pressures that threaten the continued viability of these stations.

A new report on the financial position of television stations in medium and small markets clearly demonstrates the dire financial situation of stations, especially lower-rated ones, in these

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paid to the stations that carry their programming"); Steve McClellan, *Chris-Craft Stations Re-Up with UPN*, Broadcasting & Cable at 98 (Jan. 22, 2001) (although UPN paid compensation to affiliates in the past, new affiliation agreement with Chris-Craft stations "does not provide for any").

136 *See* Attachment C, NAB, *The Declining Financial Position of Television Stations in Medium and Small Markets* at 5-9 (Dec. 2002) ("*TV Financial Report*") (showing average declines of 33%, 13%, 22%, 20% and 37%, respectively, in market groupings 51-75, 76-100, 101-125, 126-150 and 151-175).

137 *See, e.g.*, McClellan, *Small Towns, Big Problems* at 20 (profit margins, which have never been substantial for television stations in small markets, may disappear altogether if network compensation is further reduced or eliminated).

markets. *See* Attachment C, *TV Financial Report*. This report examined the profitability of ABC, CBS, Fox and NBC affiliated television stations in DMAs ranked from 51-175 in 1993, 1997 and 2001.[138] The report in particular compared the cash flow and pre-tax profits of the average high-rated station in these markets to the cash flow and profits of the average low-rated station. The results unequivocally demonstrate the declining financial position of many stations in smaller markets, especially the lower-rated stations. *See TV Financial Report* at 4, 10. These stations not only showed *declining* profitability from 1993 to 2001, but, as of 2001, the average low-rated station in markets 51-175 showed *negative* profitability. *Id.* at 4-9 (showing a percentage decline in pre-tax profitability of *124% or greater* in all market groupings from 1993-2001, and showing actual losses for these low-rated stations in all market groups in 2001). Indeed, the financial situation of television broadcasters is so dire that even the *highest-rated* stations in many medium and small markets are experiencing flat or declining profits. *See id.* at 5-9 (showing flat or declining pre-tax profits for the average high-rated station in markets 51-75, 76-100, and 126-150).[139]

Clearly, many television stations today in medium and small markets are struggling to achieve profitability. The financial pressures on those stations that are not the ratings leader in their markets are particularly acute, and obviously threaten the long-term financial viability of such stations. The average low-rated station in markets 51-175 showed negative profit in 2001, and the financial situation of these stations will in all likelihood continue to worsen. As discussed above, network compensation payments are expected to be further reduced or even eliminated in the future. The 2001 data utilized in this report, moreover, does not fully reflect

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[138] None of these years involved a national election to avoid the sometimes inconsistent impact of political advertising.

[139] And certainly if many of the highest-rated stations in these smaller markets are struggling, the mid-rated television stations must be experiencing financial difficulties as well.

either the cost of completing the DTV transition or the cost of operating dual analog and digital stations during the transition period.[140] Thus, the already poor financial position of lower-rated stations in medium and small markets will almost certainly continue to worsen over time, thereby calling into question their viability as independent operations.

2. The Declining Financial Position of Smaller Market Television Broadcasters Threatens the Viability of their Local News Operations.

Even assuming that many television stations in medium and small markets will, through cost cutting and other means, somehow maintain their viability as independent entities, these stations (and not just the lowest-rated ones) will very likely be forced to cut back or eliminate their local news operations. A number of stations – specifically citing such factors as the expenses of digital conversion, reductions in network compensation, and declining advertising revenue – have already eliminated their local news operations.[141] And as the financial situation

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[140] Stations in these smaller markets were not required to be on the air with a digital signal until May 2002, and the considerable majority of these stations were not able to meet this deadline. Thus, financial data from these stations for 2001 very likely does not reflect the full cost of the DTV transition, and certainly does not include the expense of "running two stations simultaneously during the transition period," which will be substantial. *GAO Digital Report* at 9, 16 n.27.

[141] *See, e.g., TV News: Down the Tube*, Columbia Journalism Review at 8 (Sept./Oct. 2002) (identifying eight television stations in markets such as Kingsport, TN, Evansville, IN and Marquette, MI that "have scrapped their locally produced newscasts" in recent months due to a slumping economy, a drop in network compensation, and digital transition costs); *Bye Bye, News*, Broadcasting & Cable at 40 (Jan. 7, 2002) (reporting that ABC affiliates in several markets, including St. Louis, have eliminated local news due to weak economy, decline in advertising revenues and competition); Dan Trigoboff, *Live at 11? Maybe Not for Long*, Broadcasting & Cable at 29 (Feb. 11, 2002) (questioning whether local markets can sustain as many television news departments and newscasts as currently exist); Dan Trigoboff, *The News Not Out of Topeka*, Broadcasting & Cable at 12 (April 22, 2002) (reporting on ending of local news at a Topeka station); R. Routhier, *WPXT Dropping City's Only 10 P.M. Newscast*, Portland Press Herald at 1B (June 11, 2002) (reporting on dropping of newscast in Portland, Maine); Dan Trigoboff, *CBS Drops News in Detroit*, Broadcasting & Cable at 12 (Nov. 25, 2002) (original newscasts no longer to be aired on CBS station in Detroit).

of stations, especially lower-rated ones, in medium and small markets continues to worsen, many of these stations may have no choice but to cease their local news operations.[142]

A new study by the media research and consulting firm of Smith Geiger demonstrates the likelihood that a number of smaller market stations may eliminate their local news operations. According to Smith Geiger, "the continuing profitability of a local television news operation is now highly uncertain." Attachment D, Smith Geiger, *Newsroom Budgets in Midsize (51-100) and Small Markets (101-210)* at 2 (Dec. 2002) ("*Newsroom Report*"). Due to increases in the number of local broadcast television news providers in the 1980s and 1990s and the growth of cable and satellite, "it has never been more difficult for a local television station to attract an audience," and "[t]his lack of audience leads to lower Nielsen ratings and lower advertising rates, bringing the station reduced revenues overall." *Id*. And "while revenue is more and more difficult to come by," the "costs of starting up and maintaining a local television news operation in medium and small markets continue to increase," particularly due to increased salary and benefits costs for news personnel. *Id*. at 2, 13, 15.[143] NAB's *TV Financial Report* in fact confirms the increasing news expenses of stations in medium and small markets. *See id*. at 5-9 (showing that from 1993 to 2001, the average news costs of affiliated stations in DMAs 51-176 increased 71%, 104%, 58%, 56% and 82%, respectively, in market groupings 51-75, 76-100, 101-125, 126-150 and 151-175).

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[142] *See, e.g.,* McClellan, *Small Towns, Big Problems* at 20-21 (network compensation, which is decreasing and may be ended altogether, "is the sole source of funding for key services like local news operations" in small markets, and the owner of stations in Glendive and Billings, Montana and Alpena, Michigan stated that the loss of compensation "would force him to reconsider the viability of continuing his local news operations").

[143] For a station in markets 51-100, the total annual budget for an average news operation was estimated at $5,260,000, while the average start-up costs for a news operation in these markets was estimated at $8,225,000. For a station in markets 101-210, the total annual budget for an average news operation was approximated at $1,780,000, while average start-up costs for a news operation in these markets was estimated at $2,700,000. *Newsroom Report* at 3-4; 8-9.

Moreover, acquiring alternative programming (such as syndicated programming) "represents a much lower cost than news production," and, consequently, the "average profit from acquired programming is likely to be slightly higher than that from news operations" for average stations in both medium and small markets. *Newsroom Report* at 13-14 (estimating that a local station in a medium and in a small market would earn, respectively, 5% and 30% higher profits annually from syndicated programming than from local news programming even though the advertising revenue from syndicated programming is lower than from news, due to the lesser expense of the acquired programming). For these reasons, "local stations may look to exit the local news business in favor of lower costs propositions," such as syndicated programming. *Id*. at 13.

Given the increasing costs of maintaining local news operations, as documented by Smith Geiger and NAB, and the declining financial position of medium and small market television broadcasters, as shown by NAB, one can only expect that more and more stations in smaller markets – especially lower-rated stations that are struggling to make *any* profits today – will "choose to forego their news" for the "cheaper, less financially risky, and often more profitable option of acquired programming." *Id*. at 15. It also seems highly unlikely that any station in these smaller markets, which currently does not offer local news, would commence a news operation, due to the considerable start-up costs associated with news operations and the financial challenges currently facing smaller market broadcasters generally.[144]

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[144] For example, in markets 101-210, Smith Geiger estimated the total start-up costs in the first year of a news operation to be $2,700,000. A television news operation of this size would also not be "projected to become cash flow positive" until "year 6," and an investor in such an operation could not expect to "fully recoup her initial outlay" until "year 13." *Newsroom Report* at 9, 11. Start-up news operations in markets 51-100 would have a similarly lengthy time frame for achieving a positive cash flow and any return for investors. *See id*. at 6, 15. In light of these costs and expected returns, it would appear quite unlikely that, if a station in a small market were

Thus, the case for reforming the television duopoly rule to allow duopolies in medium and small markets is clear. Smaller market television broadcasters (especially those who are not the ratings leader in their markets) are experiencing serious financial distress, which can only be expected to worsen in the future. These financial problems are sufficiently severe to threaten the long-term viability of lower-rated stations, and will, at the least, threaten the continued viability of the local news operations of many smaller market stations, even those not among the lowest-rated. Permitting common ownership of two stations in medium and small markets will provide greatly needed financial relief to stations in these markets,[145] help ensure the viability of local news operations at smaller market stations, and strengthen local broadcasters in competing against cable and other MVPDs.[146] Indeed, due to the recent judicial elimination of the cable/broadcast cross-ownership rule, a cable system operator with a monopoly position in the local MVPD market can now acquire a local television broadcast station, while the owner of a single television station cannot acquire control of a license for a second broadcast channel in most DMAs. This situation is highly inequitable and unfairly constrains broadcasters from competing in today's multichannel media marketplace.

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to cease local news, another station would "step[] in to take its place." *Id*. at 15. *Accord* Testimony of Royce Yudkoff, Managing Partner of Abry Partners, Inc., Transcript of FCC En Banc Hearing on Local Broadcast Ownership at 93 (Feb. 12, 1999) (in small markets, television station owners cannot afford to make the capital investments necessary "before turning the lights on" a local news operation, due to the high costs of "get[ting] the news on the air").

[145] *See OPP Video Study* at 134 (finding it "likely that the [earlier] relaxation of the television duopoly rule . . . has strengthened the position of some of the formerly weaker stations").

[146] *See* Haddock and Polsby, *Bright Lines* at 332 (calling on FCC to allow broadcast television duopolies to "intensify the pressure on cable systems from over-the-air competition").

3. The Commission Should Adopt a Presumptive "10/10" Rule for Allowing Television Duopolies in all DMAs.

The current duopoly rule, with its eight-voice test, prevents the formation of even a single duopoly in medium and small markets, and is therefore completely ineffective in ameliorating the deteriorating financial condition of television broadcasters in the majority of markets. To preserve the competitive and financial viability of television stations and their local news operations, especially those in smaller markets, NAB urges the Commission to adopt a presumption that television duopolies in all DMAs meeting a "10/10" standard are in the public interest. Under this standard, two stations each with a year-long average 7:00 a.m.-1:00 a.m. viewing share of less than 10 could be commonly owned, and a station with a viewing share of 10 or more could be co-owned with another station with a share of less than 10. These viewing shares are determined by Nielsen four times a year, and they reflect each station's share of *total* viewing in each DMA, taking into account the viewing of broadcast stations located outside the market and of cable networks/channels. Given the significant competitive position of MVPDs in local television markets today, any standard developed for a revised duopoly rule should obviously take cable/satellite, as well as broadcast, viewing into account.[147]

This 10/10 standard should only be regarded as a presumption, and the Commission should consider proposed combinations of stations not meeting this standard (such as the combination of two stations each with viewing shares of 10 or more, or triopolies) on a case-by-case basis, depending on the circumstances of the individual stations and the specific conditions

[147] For purposes of applying the rule, the viewing shares of the stations proposed to be commonly owned would be based on an average of the four Nielsen "books" prior to the filing of a transfer or assignment application with the FCC. Use of the four latest Nielsen books will enable this duopoly standard to reflect in a flexible manner the competitive conditions and the status of individual stations in each DMA as they change over time. And as ratings develop for broadcasters' digital stations, the combined viewing share of a licensee's analog and digital channels should be utilized as the relevant share of that licensee for purposes of the rule.

in the DMA at issue. In determining whether to grant a requested waiver of the 10/10 standard, the Commission should consider as a significant factor whether any of the stations involved are failed, failing or unbuilt. Failed, failing or unbuilt stations obviously cannot meaningfully contribute to diversity or competition in a market, and waivers of the 10/10 standard should therefore be seriously considered when one or more of the stations at issue fall into these categories.[148] Specifically with regard to the Commission's standard for establishing that a station is failing, a waiver applicant should not be required to show that the station in question is in imminent danger of either bankruptcy or "going dark." Financial evidence showing the station's lack of viability as a reasonably competitive independent concern should be sufficient.[149]

Beyond waivers for failed, failing and unbuilt stations, the Commission, to promote the transition to digital broadcasting in medium and small markets, should also consider as a factor whether the grant of a requested waiver would facilitate a station's DTV transition. *See Fifth*

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[148] The FCC's current television duopoly rule includes a waiver for failed, failing and unbuilt stations. This current waiver standard, however, requires all waiver applicants to demonstrate that the "in-market" buyer is the only reasonably available entity willing and able to acquire and operate (or construct) the station, and that sale to an out-of-market buyer would result in an artificially depressed price. The Commission should, for any duopoly waiver standard adopted in this proceeding, dispense with this requirement, which fails to promote diversity and competition in local markets. Given that the greatest economic benefits of common ownership occur between stations located in the same market, broadcasters trying to sell failed, failing or unbuilt stations are inherently unlikely to succeed in finding out-of-market buyers. Because in-market buyers would be best able to achieve the cost efficiencies associated with joint ownership that are needed to revive failed and failing stations, the Commission's requirement that owners of struggling, bankrupt or dark stations fruitlessly search for out-of-market buyers constitutes a sterile and burdensome exercise.

[149] Certainly an applicant for a "failing station" waiver should not be required to demonstrate a negative cash flow, as a positive cash flow does not necessarily demonstrate viability. Businesses with positive cash flow can still easily fail, especially if they are burdened with high debt and interest obligations. Moreover, television stations could achieve positive cash flows by cutting services offered to the public, including local news, but that would not serve viewers or the Commission's diversity and localism goals.

Report and Order, 12 FCC Rcd at 12812 (finding it "desirable to encourage broadcasters to offer digital television as soon as possible"). For instance, a waiver might be warranted in a smaller market for two stations whose viewing shares are both 10 or higher, where competitive conditions are such that even a station with a current viewing share of 10 is experiencing financial stress and appears unable to bear the high costs of the digital transition as an independent entity. Given the Commission's long-standing emphasis on the importance of local news and public affairs programming, waivers of the 10/10 standard should also be justified to permit duopolies, especially in smaller markets, where stations each with a 10 share are nonetheless unable to maintain significant local presences, including existing local news operations, in light of stagnant or declining revenues and the well-documented rising costs of news operations. And due to the high start-up costs associated with news operations, a waiver might additionally be warranted if its grant would permit the creation of a local news operation by a station previously offering no local news.[150]

The advantages of this reformed duopoly rule are obvious and numerous. As an initial matter, the rule is clear and would be simple for the Commission and for licensees alike to understand and apply. NAB's proposed rule would provide greatly needed financial relief for stations in medium and small markets that, as shown above, are facing seriously declining economic conditions. The rule would in particular provide regulatory relief for struggling low-rated stations by allowing two lower-rated stations to combine to form a stronger entity, or by permitting a lower-rated station (many of which are currently or will in the future be

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[150] The Commission should further consider approving triopolies on a case-by-case basis. A triopoly might be warranted, for example, in a large market with ten or twelve or more stations, especially if the three stations combining all had low shares. A triopoly under these circumstances could enhance competition by allowing three weak stations to combine to become a viable competitor to stronger stations in the market.

unprofitable) to combine with a profitable, competitively viable higher-rated station. At the same time, NAB's proposal would still promote the FCC's traditional goals of diversity and competition by preventing the combination of two higher rated stations in the same market, absent additional compelling circumstances.[151] NAB believes moreover that the choice of a 10 viewing share as the presumptive "cut-off" point for allowing duopolies separates market leading from non-leading stations on a reasonably consistent basis across DMAs of varying size. Permitting duopolies in DMAs of all sizes should also promote competition in local media markets more generally by enhancing the competitiveness of local broadcasters vis-à-vis cable system operators.

NAB's proposed rule would additionally promote the FCC's localism goals by preserving stations in smaller markets, especially lower-rated ones, which would in all likelihood be unable to survive as independent entities on a long-term basis. Enhancing the financial viability of local stations in medium and small markets by permitting duopolies would also directly serve the FCC's localism goals by preserving existing local news operations and promoting the development of new ones.[152] Because the proposed 10/10 duopoly standard would enhance the

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[151] For example, the Springfield, Missouri DMA (#74) has six stations (affiliates of NBC, CBS, Fox, ABC, Paxson and WB). The NBC and CBS affiliates are the leading stations in the market, earning average viewing shares of 21.3 and 14.3, respectively, which are much higher than the 6.5 and 5.8 shares earned by the Fox and ABC affiliates. (The Paxson and WB stations earn negligible shares.) NAB's proposed rule would prevent the two leading stations in this DMA from combining, but would allow any of the two lower-rated stations to be commonly owned, and would also allow either of the leading stations to acquire one of the much lower-rated stations. This rule would also promote competition in smaller markets where one station is clearly dominant. For example, in the Boise, Idaho DMA (#121), the NBC affiliate leads the market with a 26.0 share, while the ABC, CBS, Fox and UPN stations have shares of only 10.0, 9.0, 7.5 and 5.3. Under the proposed rule, any two of these much lower-rated stations could combine to become a more effective competitor to the leading station in the market.

[152] Available evidence suggests that permitting duopolies and Local Marketing Agreements would encourage commonly owned stations to start news operations for stations that previously did not have them. Belo, for example, has started newscasts on stations that previously had no

financial viability of local broadcasters, their ability to continue airing local news (particularly in smaller markets), and their capability to compete more effectively with local cable monopolists, NAB urges the Commission to adopt this proposal.

NAB also stresses that the Commission should not limit the transferability of station combinations properly formed under the 10/10 duopoly rule. Assume, for example, that the licensee of a higher-rated television station acquires a lower-rated station in the same market under the 10/10 standard. The licensee then labors to improve the less successful station, and eventually that station's viewing share rises to 10.0. The licensee ultimately decides to sell the two stations, both of which now have an average viewing share of 10.0 or more. The Commission should allow such a duopoly to be transferred intact to a new owner, rather than force the licensee to split the two stations and find separate purchasers.[153]

If the Commission were to place limits on the transferability of station combinations, these limits will be disruptive and tend to discourage investment in broadcast stations. Once a duopoly (or any other broadcast combination) has been properly formed under the local ownership rules, such a combination should be freely transferable to an entity with no other local stations in the same service. Unlike the creation of a new broadcast station combination, the sale of an existing combination cannot adversely impact the level of diversity and competition in the local market. However, requiring the separation of jointly owned stations would prove disruptive and impracticable because commonly owned stations are very likely to have

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local news operations when it acquired a second station in several markets, including Seattle, Spokane and Tucson.

[153] The FCC should also grandfather all existing duopolies, formed under the current eight voice test, even in the unlikely event that some of these duopolies do not meet the 10/10 standard. NAB expects that existing duopolies will generally meet the proposed 10/10 standard, given the current requirement that at least one of the stations in a duopoly not be among the top four ranked stations in a market.

consolidated operations, personnel and equipment. Indeed, the forced separation of commonly owned stations could negatively affect service to the public in the local market because the economic efficiencies associated with joint ownership – and the programming and other benefits made possible by those cost savings – would be lost.

Presumably, it was considerations such as these that lead the Commission in previous ownership rulemakings to *not* require the break up of station groups upon transfer or assignment.[154] NAB strongly recommends that the Commission follow its own precedent in this regard, and recognize that requiring the break up of station combinations upon transfer only "penaliz[es] enterprises that grow into stronger competitors," which is not "consistent" with the FCC's goal "to promote robust competition." *Radio Reconsideration Order*, 7 FCC Rcd at 6397. For all these reasons, NAB urges the Commission to refrain in this proceeding from placing restrictions on the transferability of station combinations formed under any revised duopoly or other local ownership rule.

D. The Commission Has No Legal or Policy Basis for Cutting Back on the Levels of Local Radio Consolidation Permitted by Congress.

As NAB argued in extensive comments submitted in the pending local radio ownership proceeding,[155] the Commission has no statutory authority – as well as no basis grounded in diversity or competition concerns – to override Congress' judgments in the 1996 Act about

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[154] *See Report and Order* in MM Docket No. 91-140, 7 FCC Rcd 2755, 2783 (1992), *recon. granted in part and denied in part, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 7 FCC Rcd 6387 (1992) ("*Radio Reconsideration Order*") (in revising radio duopoly rules to include both numerical and audience share limitations, the Commission determined not to "require a multiple owner which acquired its stations in compliance with the audience share and numerical station limits . . . to break up its station group upon transfer or assignment because the combined share of the group has grown to a level exceeding the [audience share] limit or the applicable numerical limit has changed").

[155] *See* Comments of NAB in MM Docket Nos. 01-317 and 00-244 (filed March 27, 2002); Reply Comments of NAB in MM Docket Nos. 01-317 and 00-244 (filed May 8, 2002).

ownership consolidation in local radio markets. *See Local Radio Ownership NPRM* at ¶¶ 22-27 (inquiring whether the statutory numerical ownership limits were "definitive," or whether the Commission still possessed the authority to also consider diversity or competition factors when evaluating proposed radio transactions that complied with these limits). The recent radio market studies conducted by the Commission for this comprehensive ownership proceeding have not in any way altered NAB's conclusions.

1. The Commission Lacks Authority to Override Congress' Judgment as to the Appropriate Levels of Ownership Concentration in Local Radio Markets.

NAB initially notes that none of the FCC's recent radio market research has any bearing whatsoever on the Commission's lack of authority to override Section 202(b)(1) of the 1996 Act, Pub. L. No. 104-104 § 202(b)(1), 110 Stat. 56, in which Congress expressly established the number of radio stations that could be commonly owned in local markets of varying sizes. As NAB discussed in its comments in the local radio proceeding (at 4-12), Congress' judgments as to what level of ownership concentration would serve the public interest are definitive, and the Commission lacks the authority to override those judgments by preventing or delaying radio transactions that are clearly permissible under Section 202(b)(1). Because "Congress has directly spoken to the precise question" of local radio ownership,[156] the Commission "must give effect to the unambiguously expressed intent of Congress" by approving proposed radio transactions that comply with the statutory ownership standards. *Chevron*, 467 U.S. at 843.

Moreover, as NAB explained in detail, the Commission cannot rely on its generalized "public interest" authority under the 1934 Communications Act to nullify the specific judgments that Congress made in Section 202(b)(1) about the acceptable levels of ownership concentration

[156] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984).

and diversity in local radio markets. It is a basic rule of statutory construction that the "[s]pecific terms" of a statute "prevail over the general in the same or another statute."[157] Beyond judicial determinations that specific statutes such as Section 202(b)(1) cannot be "controlled or nullified by a general one," *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974), the courts have more particularly established that administrative agencies cannot rely on their general authority to act in the "public interest" or "public convenience" if in doing so they ignore or contravene congressional intent embodied in a specific statutory provision.[158] Indeed, the Commission recently learned of the hazard of relying on its general regulatory authority over broadcast communications to justify actions contrary to specifically expressed congressional intent. *See Motion Picture Association of America, Inc. v. FCC*, 309 F.3d 796, 807 (D.C. Cir. 2002) (court found that FCC had no statutory authority to "promulgate regulations mandating video description" where Congress had only "authorized and ordered the Commission to *produce a report*" on the subject) (emphasis in original).

Thus, based on relevant precepts of statutory construction and extensive applicable case law, the Commission has a clear duty to "give effect" to the intent of Congress with regard to local radio ownership, as "unambiguously expressed" in Section 202(b)(1). *Chevron*, 467 U.S. at 843. The Commission consequently lacks statutory authority to reject, to delay, or to impose

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[157] *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228-29 (1957). *Accord Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-85 (1992); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976); *Markair, Inc. v. Civil Aeronautics Board*, 744 F.2d 1383, 1385 (9th Cir. 1984); and other cases cited in NAB's comments at 7-8 and n.10.

[158] *See Markair*, 744 F.2d at 1385-86; *International Brotherhood of Teamsters v. Interstate Commerce Commission*, 801 F.2d 1423, 1429-30 (D.C. Cir. 1986), *different results reached on rehearing*, 818 F.2d 87 (D.C. Cir. 1987) (decision mooted by subsequent legislation); *Regular Common Carrier Conference v. U.S.*, 820 F.2d 1323, 1331 (D.C. Cir. 1987); and other cases cited in NAB's comments at 8-10 and n.13.

additional public interest requirements on proposed radio transactions complying with the clear numerical limits in Section 202(b)(1), or to otherwise cut back on the level of ownership consolidation specifically permitted by Congress in that section. The biennial review provisions of Section 202(h) of the 1996 Act do not, moreover, authorize the Commission to reduce the level of ownership consolidation expressly permitted by Congress in Section 202(b).[159]

NAB furthermore emphasizes that the Commission should not attempt to cut back on the level of ownership concentration specifically allowed by Congress by changing its "contour overlap" method of defining radio markets and its method for counting the number of stations in a market, which were established in 1992. *See* Comments of NAB in MM Docket No. 00-244 (filed Feb. 26, 2001) ("*NAB Radio Market Definition Comments*"). As Chairman Powell previously cautioned, the Commission must refrain from altering its method of defining radio markets so as to "effectuate a different result than Congress intended" in setting numerical station ownership limits in the 1996 Act,[160] particularly in light of Congress' "approval" of the Commission's existing market definitions in the 1996 Act.[161] Because Congress in 1996 specifically addressed the question of local radio station ownership and did not change (or even direct the Commission to reconsider) the well-established and well-known methodologies for

[159] *See* NAB Comments in MM Docket Nos. 01-317 and 00-244 at 12-15 (filed March 27, 2002) (discussing the deregulatory purpose of Section 202(h) and how its language directing the repeal or *modification* of ownership rules no longer in the public interest does not authorize the adoption of stricter ownership regulations, especially those inconsistent with specific congressional determinations on radio consolidation).

[160] Concurring Statement of Commissioner Michael K. Powell, *Notice of Proposed Rulemaking* in MM Docket No. 00-244, FCC 00-427 (rel. Dec. 13, 2000).

[161] *Casey v. Commissioner of Internal Revenue*, 830 F.2d 1092, 1095 (10th Cir. 1987) ("When Congress is, or should be, aware of an interpretation of a statute by an agency charged with its administration, Congress' amendment or reenactment of the statutory scheme without overruling or clarifying the agency's interpretation is considered as approval of the agency interpretation.").

defining radio markets and counting stations in them that the FCC had established in 1992, the Commission's interpretation of what constitutes a radio market should be regarded as "the one intended by Congress."[162] Indeed, the Commission itself has recognized in other contexts that "it can be presumed that Congress is knowledgeable about existing, longstanding regulatory provisions when it enacts new legislation."[163]

Beyond Congress' "approval" of the FCC's well-established market definition methodologies, *Casey*, 830 F.2d at 1095, NAB has previously discussed in detail why the Commission should not, at this juncture, alter those methodologies that were adopted more than a decade ago. Although the Commission has expressed concerns about "anomalies" created by its current contour overlap method of defining radio markets and counting stations in them, no perfect, anomaly-free method of defining radio markets can be devised, given the scattered location and widely varying signal strength of radio stations. *See NAB Radio Market Definition Comments* at 5-8. And the current contour overlap approach of defining radio markets was adopted because it served the FCC's competition and diversity concerns better than other possible approaches.[164] Thus, it remains highly unlikely that altering these market-definition

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[162] *CFTC v. Schor*, 478 U.S. 833, 846 (1986) ("It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'") (*quoting NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974)). *Accord FDIC v. Philadelphia Gear Corporation*, 476 U.S. 426, 437 (1986); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978).

[163] Brief for Respondents, *National Public Radio, Inc., et al. v. FCC*, Nos. 00-1246, 00-1255 at 20 (D.C. Cir. filed Feb. 20, 2001). *See also Second Report and Order and Third Notice of Proposed Rule Making* in MM Docket No. 98-204, FCC 02-303 at ¶ 39 (rel. Nov. 20, 2002) (FCC stated that "congressional ratification of administrative action" has been inferred "from nothing more than silence in the face of an administrative policy").

[164] *See NAB Radio Market Definition Comments* at 10-13. After all, if the contours of two radio stations overlap, then those stations should be regarded as competing against each other for advertising and for listeners, especially within the overlap area.

methodologies would eliminate anomalies in defining markets, enhance the consistent and predictable application of the multiple ownership rules, or more effectively serve the FCC's core competition and diversity concerns. Above all, the Commission should not discard its current contour overlap approach in favor of a commercial market definition such as Arbitron. As NAB has previously explained, Arbitron market definitions and data lack the neutrality and consistency needed for data to be used as a regulatory tool; well over 40% of all radio stations are not located in Arbitron markets; and additional anomalies and station counting problems would be created depending upon the Commission's use of the Arbitron data, which may easily be manipulated to arrive at varying counts of stations in a market. *See id*. at 13-24. For all these reasons, NAB continues to urge the Commission to comply fully with congressional intent and not alter its long-established methodologies for defining radio markets and counting stations in them, especially if doing so would effectively reduce the level of ownership consolidation expressly permitted by Congress in local radio markets.

2. Neither Diversity nor Competition Concerns Justify Any Attempt to Cut Back on Current Levels of Ownership Concentration in Local Radio Markets.

Beyond lacking the authority to reject or delay proposed radio transactions that comply with the statutory ownership caps, available empirical evidence (including the FCC's recently completed radio market studies) provides no diversity- or competition-related justifications for thwarting congressional intent as to the allowable levels of local radio consolidation. As discussed in Section III. and in NAB's comments in the pending radio proceeding, consumers today have access to more varied radio programming than ever before, due to the expansion in the number of radio stations, the growth in the number of program formats, and the development of new technologies, including satellite radio and Internet streaming. Numerous studies have also shown that the diversity of programming formats has only been enhanced by the post-1996 consolidation within local radio markets. *See supra* Section III.C.2.[165] Not only has the number of different formats increased in local radio markets since 1996, the FCC's study on playlist diversity additionally "suggest[ed] that diversity has grown significantly among stations *within* the same format and within the same city," and stated that stations with the *same* "formats competing within the same market appear to differentiate themselves to appeal to their listeners." *FCC Music Diversity Study* at 16 (emphasis added).

This growth in programming diversity has, moreover, been characterized by both an expansion in the number of different types of music formats and in the number of stations with news, talk or other informational formats. *See supra* Section III.A. (describing two studies documenting an "explosion" in informational formats on radio between 1975 and 1995).[166] Also significantly, formats designed to appeal to different ethnic groups "continue to grow and now account for three of the top ten most popular formats across the country." *Katz Media Spring 2002 Study* at 1 (reporting that the number of stations airing formats intended to attract African-American and Hispanic listeners "has exploded over the past five or six years," in large part due

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[165] Studies by NAB in 1999, Berry and Waldfogel in 1999, BIA Financial Network in 2002, and MIT Professor Jerry Hausman in 2002 have all shown increases in the number of programming formats available in local radio markets. Several of these studies also established a causal link between increased ownership consolidation and this increased programming diversity. *See* Section III.C.2.

[166] News/talk formatted stations are also very popular with listeners. *See, e.g., R&R Today* at 2 (April 18, 2002) (1,133 radio stations are programmed with a news/talk format, making it the second-most common programming format in the country); Waldfogel, *Consumer Substitution Among Media* at 29 (among persons in consumer survey who reported listening to at least one radio format, news/talk/information was reported to be the most popular).

to consolidation, and that the listening shares for stations with these targeted "ethnic formats" is increasing).[167]

The Commission accordingly has no cause for concern that listeners today lack access to diverse entertainment and informational radio programming, especially in light of their ability to access radio programming originating from outside their local markets. *See* Attachment A, *BIA Out-of-Market Voices Study*. Moreover, despite recent consolidation within the broadcast industry and especially within local radio markets, the Commission should not be concerned about consumers' ability to access programming from a number of independently owned media outlets.[168] Thus, even if the Commission possessed the authority to cut back on the levels of permissible ownership consolidation set forth in the 1996 Act, no conceivable diversity-related rationale could justify such action.

Despite the considerable consolidation that has recently occurred in the radio industry, the Commission should also not be concerned about any lack of competition in radio markets. As discussed in NAB's comments and reply comments in the pending radio proceeding and

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[167] Commenters in earlier proceedings similarly specifically attested that consolidation has permitted radio owners to program stations to appeal to modestly-sized minority communities in medium and small markets such as Charleston, WV and Omaha, NE. *See, e.g.*, Comments of West Virginia Radio Corp. and Journal Broadcast Corp. in MM Docket Nos. 01-235 and 96-197 (filed Dec. 3, 2001). Studies have also shown that minority groups have high interest in new media technologies including satellite radio. *See* Steve Caulk, *Media Technology Entices Minorities*, Washington Times at A2 (Nov. 12, 2002) (marketing study by Starz Encore Group found high interest by minority consumers, especially African Americans, in the latest media technologies, and companies such as XM Radio have responded by offering programming geared toward African Americans).

[168] *See, e.g.*, *FCC Media Outlet Study* at Table 1 (showing that the number of independent owners of media outlets in local markets increased significantly between 1960 and 2000); *Radio Voices Study* at 1 (showing that in 2001 very large numbers of commercial radio stations either remained "standalones," or were part of local duopolies, in their respective markets).

summarized below, the existing evidence indicates that even consolidated groups are unable to exercise undue market power in the radio marketplace.

A recent study by BIA Financial Network demonstrated that the volatility of ratings and audience share in the radio industry provides a very significant check on the market power of even the leading stations or groups in local markets. This study found that the audience shares earned by radio stations are quite volatile, and that stations are able to make very significant gains in their shares over short periods of time by altering their formats.[169] Such ratings volatility necessarily reduces the ability of even market leading stations or groups to exercise market power or, indeed, to even retain their market leading position over time.

Even beyond this volatility of audience shares (and therefore advertising revenues) experienced by radio stations, the listening shares earned by market leading stations have declined consistently in recent years (*see Radio Shares Study* discussed in Section III.A.), and the Commission itself has documented that the average number of listeners to radio has fallen slightly in the past few years. *FCC Radio Trends Report* at 19. The difficulties in consistently attracting large and growing audiences that even market leading radio stations experience no doubt stem from increased competition from a variety of media outlets and technologies, including Internet and satellite radio and even "CDs or downloaded MP3s." *Id*.

This increasing competition for listeners should certainly tend to negate the ability of even consolidated radio groups to exercise anti-competitive market power, as available empirical evidence indicates. One study specifically examining market power in radio found little support for the hypothesis that increased ownership concentration has lead to collusive conduct and

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[169] *See* BIA Financial Network, *Volatility in Radio Market Shares* (March 2002), Attachment C to NAB Comments in MM Docket Nos. 01-317 and 00-244 (filed March 27, 2002). The study also "found no evidence that an increase in local ownership concentration negatively affects the ability of stations to increase their local audience share" through a format change. *Id*. at 17.

market power in the industry.[170] This study of profits and concentration in the radio industry concluded that "radio station groups achieve efficiencies relative to stand-alone stations," and that "[t]hese efficiencies are achieved through group ownership *without* a corresponding increase in market power" of radio broadcasters generally. Ekelund, *et al., Market Power in Radio Markets* at 181 (emphasis added). In expressly examining "whether concentration leads to economic efficiency or to market power," this study clearly found that "group ownership" did "increase efficiency" rather than market power. *Id.* at 157, 159. And radio operators must continue to strive for these increased efficiencies if they are to remain viable during difficult economic conditions in today's competitive media marketplace, as demonstrated by the increase in 2002 of radio licensees filing for bankruptcy. *See Inside Radio* at 1 (Nov. 18, 2002) (2002 "will record the most bankruptcy filings by radio licensees" since the late 1980s and early 1990s).

The conclusion that group ownership has lead to economic efficiency in the radio industry, rather than market power, is also supported by two studies submitted in the pending local radio ownership proceeding. One study of over 3000 radio stations concluded that "high levels of market concentration among local radio stations do not result in higher [advertising] prices," but "actually results in *lower* prices for advertisers, most likely because of substantial efficiencies from local multi-station ownership."[171] Another study using data provided by 121

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[170] R.B. Ekelund, Jr., G.S. Ford and T. Koutsky, *Market Power in Radio Markets: An Empirical Analysis of Local and National Concentration*, 43 J. Law & Econ. 157 (2000).

[171] Stephen Stockum, *The Pricing of Radio Advertising: Does Market Concentration Matter?* at 3, Attachment B to Comments of Cumulus Media in MM Docket Nos. 01-317 and 00-244 (filed March 27, 2002). Because the actual prices of radio advertisements are generally not publicly available, this study used, as a proxy for the price paid for radio advertising, a measure of radio station revenue per rating point calculated from BIA revenue reports and Arbitron ratings. As the author explained, this proxy "is closely related to what is known in the radio industry as

participating stations in 37 Arbitron markets concluded that radio ownership consolidation did not lead to higher advertising prices, but found that the average change in radio advertising prices was lower in markets with greater increases in concentration between 1995 and 2001. *Hausman Study I* at 2-7.

The Commission's own study on the question of ownership concentration and radio advertising prices concluded that "increases in local concentration" after 1996 "modestly increased local radio advertising prices," apparently because, at the local level, "consolidation does create more market power."[172] This study, however, is based on questionable data, and it asserted broad conclusions that are not supported by the data and the actual results of the study.

As an initial matter, the study used SQAD data, which, as explained above, is derived from the reports of the advertising prices paid in various markets by some *national and regional*, rather than *local*, advertisers. This data includes only a limited portion of the buys made by even these national and regional advertisers in local markets; moreover, in medium/small radio markets, national and regional advertising may constitute only 10%-20% of the total advertising revenues. The authors of this study to an extent recognized the limits of their data, as they stated that the "rates paid by local advertisers likely differ from the rates paid by national and regional advertisers." *FCC Radio Advertising Price Study* at 7. But in light of all the limitations of SQAD data, it must be questioned whether this study can even purport to measure accurately the *local* radio advertising market. Certainly based on this limited data, the authors cannot appropriately reach the broad conclusions that they assert about *local* radio markets. *See id.* at

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'cost-per-point,' *i.e.*, the cost of a radio ad per Arbitron share point," which is "the relevant measure of price" from an "advertisers' perspective." *Id.* at 3-4.

[172] Keith Brown and George Williams, *Consolidation and Advertising Prices in Local Radio Markets* at 2, 18 (Sept. 2002) ("*FCC Radio Advertising Price Study*").

18 (finding that "[a]t the local level . . . consolidation does create more market power, by allowing the exercise of increased unilateral market power").[173]

Beyond reaching inappropriately broad conclusions unsupported by their limited data, the authors elsewhere in the *FCC Radio Advertising Price Study* ignored their own findings about the significance or insignificance of certain variables, thereby calling into question the conclusions reached. Specifically, the study clearly found that the "number of owners in each local market" had *no* statistically significant effect on advertising prices. *Id*. at 8, 16 (the "effect of the number of owners is negative but statistically insignificant in both models"). However, *immediately* after concluding that the number of owners was not a significant variable in explaining changes in local radio advertising prices, the authors used the statistically *insignificant* coefficient in their example purporting to show how a decline in the number of owners from four to three in a hypothetical local radio market would increase the price of advertising in that market. *See id*. at 16. The use of an admittedly statistically insignificant coefficient in this manner is inappropriate and seems to show a lack of objectivity by the authors. And in addition to misusing a statistically insignificant variable, the authors downplayed their finding that the *greater* presence of large national owners in local radio markets appeared to

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[173] The *FCC Radio Trends Report* similarly relied on this very limited SQAD data in its examination of radio advertising rates. *See id*. at 20 (finding that radio advertising prices have increased "dramatically more than inflation" since 1996 but offering no explanation as to the cause). This report's analysis of the pricing data is also questionable because it apparently averaged together the prices for each advertising buy in each local market and then averaged the prices across all markets. By using these various averages, the study failed to account for variations in the sizes of advertising buys and for variations in the sizes of markets, and apparently equally weighted all advertising buys within markets and then equally weighted all markets, regardless of their size. Such equal weighting of all buys and all markets could easily result in distortions of the advertising price information and any changes in prices over time.

decrease the advertising rates paid by national and regional advertising agencies in those markets. *Id*. at 2, 17.[174]

Certain additional aspects of this study – particularly concerning other variables and their effect on local advertising prices – also appear questionable. Even though this study purported to examine consolidation and prices in *local* radio markets, the authors failed to include any variables representing *local* economic conditions in these markets (*e.g*., the level of retail sales).[175] Population was included as a variable, but the study's finding – that an increase in a market's population has a *negative* impact on the price of radio advertising – frankly makes little sense. *See id*. at 15 (finding that the effect of population is "significantly negative"). Certainly this finding is contrary to widely held beliefs in the radio industry, and other studies have found population to be a highly significant *positive* variable in determining radio station advertising rates.[176] This completely anomalous result of the effect of population must lead one to question further the accuracy of the data and/or the methodology utilized in the FCC's study. Finally, the study overstated the concentration in local radio markets by using only the revenue shares of the radio owners in each market to calculate the Herfindahl-Hirschman Index ("HHI") for each local

[174] Specifically, the "degree to which a local market contains large national radio firms" was found to have significant *downward* pressure on local radio advertising prices. *FCC Radio Advertising Price Study* at 9, 16-17. However, in their example of a hypothetical market experiencing advertising price rises after a merger between two of the four owners, the authors did not include this variable that places downward pressure on advertising rates. *See id*. at 16.

[175] Data on local retail sales are available, and would have been useful in considering whether the strength or weakness of the local economy significantly affected advertising prices in local radio markets.

[176] Stockum, *The Pricing of Radio Advertising* at 9. Consistent with general beliefs in the radio industry, this study found that larger population areas "are more valuable for advertisers and thus command higher prices." *See also Hausman Study I* at 9, 11 (concluding that "changes in television advertising prices, newspaper advertising prices, and population" were the main determinants of changes in radio advertising prices between 1995 and 2001).

market. Audience shares generally indicate considerably lower levels of concentration than revenue shares because audience data take account of the significant out-of-market listening that occurs in many radio markets. *See* Attachment A, *BIA Out-of-Market Voices Study*. The authors of this study could, relatively easily, have also calculated the HHI for local markets with audience shares, and it would have been quite interesting to see whether this differently calculated local HHI had any statistically significant effect on the price of local radio advertising. *See FCC Radio Advertising Price Study* at 15 (concluding that in increase in the local HHI calculated using revenue shares caused "a small but statistically significant increase in the price of local radio advertising").[177]

In sum, this study's conclusions as to the causal connection between increases in local concentration and modest increases in local radio advertising prices cannot be relied upon as the basis for any Commission decision. The authors of this study misused their findings about the significance or insignificance of certain variables and drew inappropriately broad conclusions unsupported by their very limited data. Especially in light of other studies concluding that group ownership has lead to economic efficiency, rather than market power, in the radio industry, the unsubstantiated and overly broad conclusions asserted in this study about the increase in market power in local radio markets should be disregarded.

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[177] The FCC similarly neglected in another study to utilize any measure other than revenue shares when depicting the "concentration ratios" in local radio markets. Although the FCC expressly noted that "[m]arket shares may be calculated as the firm(s)' percent share of revenue . . . or may be calculated as the firm(s)' percent share of audience or capacity," *FCC Radio Trends Report* at fn. 10, the Commission in this second study failed to use an audience share measure of concentration, which would indicate considerably lower levels of concentration. Radio revenue shares, moreover, are all based on Arbitron market definitions, which, as NAB previously explained in detail, are inappropriate for use as a regulatory tool. *See NAB Radio Market Definition Comments* at 13-24.

Given the lack of reliable evidence in the record in this proceeding and in the pending local radio proceeding that increased ownership concentration has caused significantly higher advertising rates or other tangible competitive harm in the marketplace, the Commission – even if it had the legal authority – simply has no basis upon which to impose further restrictions on radio ownership in local markets. Indeed, the case for any Commission action to address concentration in the radio industry appears particularly weak because radio is the *least* consolidated media sector.[178] Beyond lacking the authority to reject or delay proposed radio transactions that comply with the statutory ownership caps, the Commission, in light of all the available empirical evidence, also lacks any competition- or diversity-related justifications for thwarting congressional intent as to the allowable levels of local radio consolidation. The Commission must therefore cease its practice of "flagging" for further review proposed radio station transactions that comply with the congressionally established numerical ownership caps.

VI. Conclusion.

The Commission originally adopted its local ownership rules decades ago when the broadcast industry – and, indeed, the media marketplace – were dominated by a relatively small number of broadcasters offering a single channel of programming each. Technological advancements, the growth of multichannel video and audio media outlets, and an expansion in the number of broadcast outlets in the past several decades have had two highly significant effects on the mass media marketplace. First, consumers in local markets of all sizes now have access to a vast array of broadcast and nonbroadcast media outlets. Numerous surveys have

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[178] *See* Attachment E, Wachovia Securities, *Chart of Revenue Shares of Media Sectors* (the top ten owners in the radio industry earn only 44% of the industry' revenues, making radio less consolidated than other media sectors particularly cable and DBS, which are highly consolidated). Moreover, the FCC itself recently noted that the trend toward greater consolidation in local radio markets "has substantially tapered off over time." *FCC Radio Trends Report* at 6.

documented this proliferation of media outlets in local markets of all sizes, and a newly conducted study demonstrated that consumers routinely access additional "out-of-market" outlets. Second, traditional broadcasters no longer enjoy their preeminent position in the media marketplace, but are struggling to maintain their audience and advertising shares "in a sea of competition." *OPP Video Study* at i.

In light of these technological and marketplace developments, the Commission must seriously consider whether its local broadcast ownership rules in their current form continue to serve the traditional goals of competition, diversity and localism. NAB believes that they do not. In a multichannel environment dominated by consolidated cable and DBS system operators, broadcasters are certainly constrained in their ability to "obtain[] and exercise[e] market power," which undercuts the traditional competition rationale for maintaining a thicket of local ownership rules applicable only to broadcasters and not their competitors. *Local TV Ownership Order*, 14 FCC Rcd at 12916. Indeed, the primary competition-related concern in today's digital, multichannel marketplace is the continued ability of local broadcasters to compete effectively and to offer free, over-the-air entertainment and informational programming (including local news) to consumers. To best achieve the Commission's goals of a competitive media marketplace that provides lower prices, better service and greater innovation to consumers, the Commission should now structure its local ownership rules so that traditional broadcasters and newer programming distributors can all compete on an equitable playing field. This reform of these broadcast-only local ownership restrictions is made particularly urgent in light of the recent judicial elimination of the local cable/broadcast cross-ownership rule.

Marketplace developments have also undercut, at least to a considerable extent, the diversity rationale for maintaining a thicket of broadcast-only local ownership restrictions. The proliferation of broadcast outlets and the rise of new multichannel video and audio programming distributors have produced an exponential increase in programming and service choices available to viewers and listeners. The public's interest in receiving diverse programming is therefore clearly being met on a market basis. Numerous studies have confirmed that the recent consolidation within local broadcast markets, especially among radio stations, has only enhanced this diversity of programming. Both older and quite recent studies moreover indicate that ownership consolidation does not significantly inhibit the expression of diverse viewpoints by commonly owned outlets in local markets. The ability of consumers to access a diverse range of media outlets to obtain differing programming and viewpoints is further significantly enhanced by the growing level of substitutability between media for both entertainment and informational purposes. Surveys recently conducted for the Commission clearly do not support the view that consumers are solely or uniquely dependent on broadcast outlets for either entertainment or for information, but reveal considerable substitutability between media for various uses. The recent and growing expansion of nonbroadcast media (especially cable, satellite and the Internet) as sources of both national and local news and information casts further doubt on the diversity rationale for retaining the local broadcast ownership rules in their current form.

In reforming the existing local ownership rules to reflect today's competitive and diverse media marketplace, NAB urges the Commission to refrain from adopting either a case-by-case approach or a single local ownership rule. A case-by-case approach is practically untenable and would cause unacceptable uncertainty and delays. A voice-dependent single local ownership rule would, like voice tests generally, involve myriad difficulties in counting voices and in defining the appropriate geographic market in which to count the voices deemed to be relevant. Beyond these challenges, a single rule approach would additionally entail extraordinarily complex questions of rationally comparing or weighing media outlets of varying type and scope. In light of its goal to establish judicially sustainable local ownership regulations, the Commission should eschew this approach in favor of a simpler and less radical option specifically recognized in the *Notice*.

As discussed in the *Notice* (at ¶ 110), NAB believes the Commission should eliminate the newspaper/broadcast and radio/television cross-ownership rules and retain limited and properly reformed same-outlet restrictions. Despite several attempts commencing in the 1940s, the Commission has never adequately justified its absolute prohibition on common ownership of newspapers and broadcast facilities in the same market. It has consistently failed to establish the existence of any competitive or other concrete harms arising from newspaper/broadcast cross-ownership, and the FCC's entirely speculative diversity rationale for adopting the rule in 1975 can no longer support its retention, given consumers' ability today to access a much wider array of increasingly substitutable broadcast and nonbroadcast outlets to obtain news and information. Indeed, the case for repealing this anachronistic ownership ban is now compelling because it inhibits the development of new innovative media services, especially on-line and digital services, and precludes struggling broadcast and newspaper entities, particularly those in smaller markets, from joining together to improve, or at least maintain, existing local news operations.

The radio/television cross-ownership rule similarly does nothing to advance the public interest under current marketplace conditions. The rule is no longer needed to ensure diversity in local markets, but in its current form primarily serves to limit radio station ownership arbitrarily. With television and radio broadcasters facing unprecedented competition from cable, DBS, and satellite and Internet radio, a cross-ownership rule applicable only to local radio and television broadcast stations is inequitable and outdated. Particularly if the Commission retains the local radio ownership rule and the television duopoly rule in some form (as NAB has recommended in these comments), no plausible reason exists to also retain the cross-ownership rule, as any diversity or competition concerns can be addressed more directly by these other local rules.

In light of the declining financial performance of medium and small market television stations, the Commission should reform the television duopoly rule to allow the formation of duopolies in these markets. A number of factors – including increasing competition from cable and other sources, the costs of the DTV transition, and the decline of network compensation – have combined to squeeze the profits of local television broadcasters in medium and small markets as never before. A new report on television station finances clearly demonstrates the declining financial position of smaller market television stations between 1993 and 2001, particularly for those stations not among the ratings leaders in their markets. And given the considerable and growing expense of maintaining local news operations, some television stations have already and greater numbers in the future will be forced by financial considerations to forego providing local news in medium and small markets.

To preserve the competitiveness and financial viability of television stations and their local news operations, NAB urges the Commission to adopt a presumptive "10/10" rule for allowing television duopolies in all DMAs. Under this standard, two stations each with an average 7:00 a.m.-1:00 a.m. viewing share of less than 10 could be commonly owned, and a station with a viewing share of 10 or more could be co-owned with another station with a share of less than 10. This reformed rule would provide needed financial relief for struggling lower-rated stations, especially those in medium and small markets, while still promoting diversity and competition by preventing the combination of two higher-rated stations in the same market (unless circumstances warranting a waiver were shown).

Finally, NAB argues that the Commission has no statutory authority – as well as no basis grounded in either diversity or competition concerns – to override Congress' judgments in the 1996 Act about ownership consolidation in local radio markets. Congress' determinations as to the appropriate levels of local radio ownership set forth in Section 202(b)(1) of the 1996 Act are definitive, and the Commission must accordingly approve, without delays or the imposition of any additional public interest requirements, proposed radio transactions that comply with these statutory numerical limits. The FCC therefore should immediately end its unauthorized "flagging" procedure.

The available empirical evidence, including the FCC's recently completed radio market studies, moreover provides no diversity- or competition-related justifications for thwarting congressional intent as to the allowable levels of local radio consolidation. Numerous studies have demonstrated that radio programming diversity has continued to increase since 1996. A variety of studies also indicate that even consolidated radio groups are unable to exercise undue market power in the radio marketplace, due to the volatility of ratings and audience shares received by radio stations, declining listening shares earned by even market leading stations, and increased competition from a variety of media outlets. Given the lack of reliable evidence in the record that increased ownership concentration has caused significantly higher advertising rates or other tangible harm in the marketplace, the Commission – even if it possessed the legal authority – simply has to basis upon which to decline to give full effect to the local radio ownership standards set forth in Section 202(b) of the 1996 Act.

For all the reasons set forth in detail above, NAB urges the Commission to repeal the newspaper/broadcast cross-ownership rule and the radio/television cross-ownership rule; to reform the television duopoly rule to permit duopolies in medium and small markets; and to approve, without delays or the imposition of any additional public interest requirements, proposed radio station transactions that comply with the statutory local radio ownership limits.

Respectively submitted,

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